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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

No. 547.

AQUILLA REDDITT, JAMES WILLIFORD REDDITT and MILDRED ION REDDITT, non compos mentis, by Bennett H. Hurt, their Domiciliary Guardian and Next Friend, and Bennett H. Hurt, Domiciliary Administrator of the ESTATE of ERNEST REDDITT, Deceased, *Petitioners,*

vs.

JAMES C. HALE, Individually, and as Curator by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATES of AQUILLA REDDITT, JAMES WILLIFORD REDDITT, MARY LOU REDDITT, and ERNEST REDDITT and/or MILDRED ION REDDITT, JOHN FOGLEMAN, KATHLEEN KIRK WILLIFORD, Individually, and as Executrix by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATE of J. E. WILLIFORD, Deceased, NATIONAL SURETY CORPORATION, a New York Corporation Domesticated and Doing Business in Arkansas, and FIDELITY and CASUALTY COMPANY of NEW YORK, a New York Corporation Domesticated and Doing Business in Arkansas, *Respondents.*

CERTIORARI TO EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, ASSIGNMENTS OF ERROR AND BRIEF.

(See Subject Index—Next Page.)

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POINT ONE: Under its inherent jurisdiction to appoint receivers, a *court of general equity jurisdiction* doubtless has jurisdiction to appoint some suitable person to take over and preserve property in its state belonging to a non-resident incompetent when such an appointment is necessary in the circumstances to prevent the loss or dissipation of the incompetent's estate. Certain it is, however, that *no other court has such jurisdiction in the absence of a constitutional provision or statute expressly conferring it.*

When this "curator" was appointed, Arkansas had chancery courts. Yet here we have a case where a probate court—an inferior court, which is the statutory successor of, and had only the jurisdiction historically exercised by, county courts—assumed to itself the jurisdiction and prerogatives of a court of general equity jurisdiction (and more) by undertaking to appoint what was, and is, in effect, a *receiver* for lands in its county belonging to non-resident incompetents who were under guardianship in another state.

Aside from the lack of process or notice of any kind to the incompetent owners or their domiciliary guardian, who had for years been managing their lands in Arkansas pursuant to the laws of that state, and aside from the palpably fraudulent scheme in which that appointment played so significant a part, that "*curatorship*" *proceeding* was, and is, *coram non judice and void on the face of the record* for the reason that the constitution or statutes of Arkansas never conferred upon the Probate Court of Crittenden County any such jurisdiction as it then undertook to exercise. 27

POINT TWO: Moreover, and aside from that, and aside from the alleged fraud and lack of process or notice of any kind to these non-resident owners or their guardian, this record conclusively shows that the Probate Court never even attempted in that "curatorship" proceeding to exercise whatever jurisdiction it may have had as to the rights of petitioner *Mildred Ion Redditt,* who was then a one-fourth and is now a one-third, co-tenant in that plantation, and leaves considerable doubt as to whether the court exercised effectively whatever jurisdiction it had as to petitioner *James Wilford Redditt,* who also owned a one-fourth and now owns a one-third, undivided interest in that plantation:

The record shows (First Appeal, R. 22 and 23) that the petition and order under which Curlin was appointed "curator" show on their face that he sought to be, and was, appointed only for the lands of "*Aquilla, J. W., Jr., Mary Lou and Ernest Redditt*" (Mary Lou Redditt had been dead 9 years when that petition and order were filed and entered (First Appeal, R. 4). So far as this record shows, there never was a "J. W., Jr." among the children of Greenberry Redditt who

are the owners of this property). How an adjudication as to them could affect the rights of petitioners Mildred Ion Redditt and James Williford Redditt, who are the owners in co-tenancy of two-thirds of this plantation, is left unexplained 46

POINT THREE: The petition of November 2, 1949 (First Appeal, R. 26), was filed pursuant to an Arkansas statute authorizing a foreign guardian to petition in the probate court for leave to rent his ward's lands in Arkansas, *et cetera.* Whatever may rightly be said of petitioners' taking "contradictory positions" in commencing this federal court action "without dismissing" that petition, there is no basis in law or reason for saying that the filing of that petition conferred upon the Probate Court of Crittenden County, Arkansas, jurisdiction which the Constitution or statutes had not conferred upon that court.

The dismissal of that petition—before the proof in chief in support thereof had even been heard—was pursuant to the Arkansas statutes and cases permitting voluntary dismissals at any time before "final submission" upon payment of costs.

No accounting could have been had under that petition unless the Probate Court, *in its discretion,* saw fit to *grant* the petition, and certain it is that the petition was not granted and no accounting was had.

Therefore, whether the dismissal of that petition was voluntary or involuntary does not alter the soundness of the assertion that its dismissal was not *res judicata* of petitioners' rights either as to the only two respondents who were parties to that petition (Hale and surety) or as to the other respondents here—who were not parties to that petition and as to whom the

Eighth Circuit held (on the First Appeal) that the pendency of that petition did not even afford grounds for partially and temporarily abating this action 47

POINT FOUR: There is an Arkansas Statute which expressly eliminates the running of any period of limitations against insane persons. The Eighth Circuit cites no reason nor authority for holding that statutory exception inapplicable to incompetents resident and under guardianship in another state, and this record suggests none 51

POINT FIVE: A complaint should not be dismissed for insufficiency under the "Rules of Civil Procedure" unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proven in support of his claim. And by the express words of Rule 56, a motion for summary judgment should be granted only when it clearly appears that

> "..... there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

How, on this record, the "complaint" in this cause (First Appeal, R. 2-13) can be dismissed on motion under either Rule 12 or Rule 56 without doing violence to the principles controlling the practice under those rules, as announced by this Court in an unbroken line of decisions, is a mystery. To permit those salutary principles to be prostituted by the dubious expedient of hypothesizing that

> "The facts are not in dispute."

is to disavow those principles and to make of those rules a treacherous means for giving an aura of legitimacy to an unjustifiable conclusion 52

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CERTIORARI TO EIGHTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth

Circuit entered on October 29, 1952, affirming the District Court's dismissal of petitioners' complaint on motion for summary judgment and for failure to state a claim on which relief can be granted.

OPINIONS BELOW.

The opinion filed by the court below on October 29, 1952, is the third in a series of appeals which have marked the course of nearly three years of effort on the part of these non-resident, incompetent petitioners to secure a hearing of this case on its merits in the District Court at Jonesboro, Arkansas. That opinion has not yet been reported, but is printed as the last document in the record compiled under Rule 38(7) and filed herewith. That opinion (No. 14,559-560) is referred to hereinafter as the opinion on the Third and Fourth Appeals.

The opinion filed by the court below on the Second Appeal on May 15, 1951, is reported at 188 F. 2d 832, and that filed on the First Appeal on October 17, 1950, is reported at 184 F. 2d 443. Each of these opinions immediately follows in the record filed herewith the records on each of those prior appeals, which records and opinions are hereinafter referred to as the records and opinions on the First Appeal and Second Appeal. The opinion filed by the Eighth Circuit in a collateral proceeding wherein petitioners undertook by petition for mandamus to secure compliance by the District Court with the Eighth Circuit's opinion on the First Appeal is reported at 186 F. 2d 716, and is styled "Redditt v. Trimble."

BASIS OF JURISDICTION.

This Court has jurisdiction to review this decision under Title 28, Section 1254, of the United States Code.

QUESTIONS PRESENTED.

1. Where is the justice in permitting these defendants, under the egis of an *ex parte* proceeding in an inferior Arkansas court, to compel these non-resident, incompetent petitioners to accept an average of only $1,400.00 for their Arkansas plantation when that plantation has a fair rental value of over $9,000.00 per year? Aside from whether that proceeding was a part of a fraudulent scheme (as it allegedly was) for depriving petitioners of both the use and fair rental value of their Arkansas plantation, how can it protect from liability as trespassers or trustees *ex maleficio* those who participated in, or profited by, that deprivation when it is plain under the decisions of the Arkansas Supreme Court that the "curatorship" proceeding upon which defendants rely for protection is void on the face of the record for the reason that the Constitution and Statutes of Arkansas never conferred upon the Probate Court of Crittenden County any jurisdiction whatsoever over lands in that County belonging to incompetents resident and under guardianship in another state? Did the necessitous supplications of the guardians of these petitioners, who had no other source of funds, legitimate this usurpation and confer upon the Probate Court of Crittenden County a jurisdiction which the Constitution and Statutes of Arkansas had denied to it?

(See "Brief of Petitioners," "Point One," page 27, hereinafter.)

2. When the District Court dismissed the complaint on the first pre-pleading motion "for want of jurisdiction," the Eighth Circuit, in reversing and remanding this case on the First Appeal (184 F. 2d 443), experienced no difficulty in seeing that the complaint alleges not only that the State Court proceeding referred to above was

> "_____ conducted *ex parte* in a court devoid of jurisdiction either over the subject matter or the necessary parties" (First Appeal, R. 9).

but that it also alleges that the "curatorship" proceeding was an integral part of a fraudulent scheme—a "cozy arrangement"—whereby these non-resident incompetents have been defrauded of the use and fair rental value of their Arkansas plantation. Indeed, the Eighth Circuit points out in its opinion on the First Appeal (filed October 17, 1950) that the complaint is at least partly predicated upon

> "_____ the tortious or fraudulent acts of those defendants _____" *et cetera.*
> (184 F. 2d 443.)

But in its opinion filed October 29, 1952, the Eighth Circuit says that the complaint

> "_____ charges no fraud _____."

A glance at the complaint (First Appeal, R. 2-13) will establish the egregious inaccuracy of the latter statement and unless we assume to be true all facts alleged in the complaint, and all provable in support thereof—an assumption which would irretrievably wreck the contentions of respondents—how can it be said that "The facts are not in dispute" (Third and Fourth Appeals, Ap. 1). Which raises the question, "What can be found in this record to justify dismissal of this complaint on motion?"

> (See "Brief of Petitioners," "Point Five," Page 52, hereinafter.)

3. In reversing and remanding this case on the First Appeal (184 F. 2d 443), the Eighth Circuit held, and needs must have held, that the complaint stated against defendants, among them defendant John Fogleman, a claim or claims upon which relief can be granted. Yet, in affirm-

ing the District Judge at Jonesboro in his latest dismissal of the complaint in this cause on a pre-pleading motion, the Eighth Circuit on October 29, 1952, says that the same complaint now states no claim against defendant John Fogleman upon which relief can be granted and should, accordingly, be dismissed. Is there anything in this record to justify this most recent conclusion?

SUMMARY STATEMENT.

Initially, the District Court dismissed the complaint on motion "for want of jurisdiction" apparently on the theory that the pendency in the courts of the State of Arkansas of the "curatorship" proceeding hereinafter referred to deprived the federal courts of jurisdiction.

In reversing and remanding the case on the first appeal, the Eighth Circuit held that there was no basis for so applying the doctrine of "another action pending" as to deprive the plaintiffs in this action for money judgments of their "constitutional right to the independent opinion and judgment of the judges of the national courts."

The Eighth Circuit did say, however, that in filing this action in federal court *"without dismissing"* a petition which they filed in the Probate Court of Crittenden County, Arkansas, on November 2, 1949 (First Appeal, R. 26), plaintiffs were assuming *"contradictory positions"* as to *two of the defendants* and ordered this action partially and temporarily abated as to them until the State Court action "is disposed of in that court, or for a reasonable length of time."

Petitioners thereupon sought to exculpate themselves from all imputations of assuming "contradictory positions" by voluntarily dismissing the only proceeding in courts of

Arkansas over which they had any control—the petition which they filed in the Probate Court of Crittenden County on November 2, 1949 (First Appeal, R. 26).

But though defendants had stoutly maintained on the first appeal that the *pendency* of that petition was most prejudicial to them, when petitioners sought to voluntarily dimiss it, defendants then insisted that its *dismissal* would be prejudicial to them.

The resultant situation, in which the District Court again held with the defendants, was the subject of a second appeal wherein the Eighth Circuit held:

> "The question whether the proceedings in the Probate Court of Crittenden County, Arkansas, referred to in our former opinion, have been terminated, as the appellants claim, is not before us on this appeal."

The defendants thereupon filed motions to dismiss and for summary judgment under Rules 12 and 56, which the District Court granted and again *dismissed the complaint as to all defendants.* The essence and theory of this most recent summary dismissal is that the voluntary dismissal of their petition of November 2, 1949 (to which *only two* of the *defendants were parties*), is *res judicata* of the issues herein as to *all defendants.*

Without attempting to reconcile that result with its opinion on the First Appeal, the Eighth Circuit affirmed.

The overtones and implications of all this are scarcely more than discernible from the cold, printed pages of the appellate records in this case, but fortunately the determinative essentials are there recorded, bold and plain. Once those essentials are thoroughly understood, the story becomes a simple one, and the determinative principles of law emerge equally simple and apparent.

But, inevitably, it is necessary to an accurate understanding of those essentials, and of the issues here presented, to know what was involved and what was decided on these successive appeals. To eliminate possible confusion, the references hereinafter made to the records and opinions have been prefixed "First Appeal," "Second Appeal," and "Third and Fourth Appeals," and those records and opinions appear in chronological order in the record here.

The petitioners and plaintiffs are Tennesseeans. Three of them are brothers and sisters and are *non compos mentis.* They sue by their domiciliary guardian and next friend, Bennett H. Hurt, who, as domiciliary (Tennessee) administrator of the deceased brother, Ernest, who was also *non compos,* is the fourth plaintiff.

Their "complaint" (First Appeal, R. 2-13), filed in the United States District Court at Jonesboro, Arkansas, on February 6, 1950, predicates jurisdiction upon diversity of citizenship and involvement of a substantial federal question and demands money judgments and incidental relief. Though it otherwise does no more than make a "short and plain statement showing that the pleader is entitled to relief" and makes no attempt to plead the evidentiary facts or to theorize as to the rules of law which would entitle plaintiffs to recover against the various defendants upon proof of the facts stated in the "complaint" and all that might be proven in support thereof, it might be helpful here to summarize its allegations.

Petitioners' mother, Sudie Agnes Williford (Redditt) and her brother, J. E. (Ernest) Williford, inherited considerable acreage in Crittenden County, Arkansas, and partitioned it by deed. Thereafter, on petition of her brother, Ernest, Sudie was adjudged *non compos mentis.*

Later, her oldest son, Aquilla Redditt, killed his mother and his youngest sister, Mary Lou Redditt, with an axe.

Sudie's surviving children were thereupon adjudged incompetent by the courts of Tennessee, of which State they at all times have been, and are now, residents.

Meanwhile, their uncle, Ernest Williford, was operating their plantation in Crittenden County, Arkansas, under a "trusteeship" from their mother—his long incompetent and now murdered sister, Susie Agnes Williford (Redditt). That "trusteeship" terminated when his sister's youngest child, plaintiff Mildred Ion Redditt, became twenty-one. But their uncle was reluctant to relinquish the absolute control which he had so long exercised over the Arkansas plantation of his incompetent nieces and nephews. However, their Tennessee guardian finally persuaded their uncle that if he was to continue to use and profit by their plantation it would have to be as a tenant of their domiciliary guardian.

Meanwhile, their uncle lost by foreclosure practically all his own land except his headquarters, which adjoined their plantation, making it doubly important to him to continue his control of theirs.

He was three years behind in his rent and suit was pending against him and others in Chancery Court of Shelby County, Tennessee, when their uncle's friend and close political associate, Howard Curlin, Sheriff of Crittenden County, Arkansas, procured the appointment by the Probate Court of Crittenden County, Arkansas, of himself as "curator" of petitioners' lands in that County and proceeded to rent them to their uncle.

That appointment was accomplished without process or notice of any kind on or to these incompetent Tennessee owners of that Arkansas plantation and the rental of their plantation to their uncle by his friend and close political associate—the "curator"—was accomplished without

their uncle's being under the present necessity of either paying or securing the three years rent he was already in arrears and for which he was then being sued in the Chancery Court at Memphis, Tennessee. And the accommodating "curator" even petitioned for, and received, court approval to waive the current year's rent.

The "Complaint" continues thus (First Appeal, R. 9):

> "A more accommodating and considerate landlord than his friend the 'curator' it would have been difficult for their uncle to imagine and impossible for him to find.
>
> "The 'curator' seems to have collected when he (the tenant) was agreeable to paying such rents as his friend the tenant cared to pay which, needless to say, were always far less than the reasonable value of these lands."

It then details how that "cozy arrangement" continued with defendant Fogleman succeeding Wheeler as "curator" Curlin's attorney; with Fogleman's law partner and co-defendant, Hale, succeeding Curlin as "curator" at Curlin's death; and with their uncle's wife and administratrix, who had participated in, and profited by, that scheme for years, becoming a cotenant with their uncle and succeeding him as tenant upon his death in 1949.

The "complaint" alleges that as a consequence of that "cozy arrangement" they received from their plantation in Crittenden County, Arkansas, in the seventeen years 1933 through 1949, an average of only $1,400. Whereas they should have received $9,000 per year, plus the $10,700 which the "curator" received for a levee right-of-way through the place.

The "complaint" asserts that the proceeding in Crittenden Probate "was conducted *ex parte* in a court *devoid of jurisdiction over the subject matter* or the necessary

parties." Consequently, it asserts that all who participated in, or profited by, that scheme are liable as trespassers to these incompetent, non-resident owners of that plantation.

(The authorities which support petitioners' position that the proceeding wherein the Probate Court of Crittenden County, Arkansas, assumed to itself the prerogatives of a court of general equity jurisdiction by undertaking to appoint what was and is, in effect A RECEIVER for the lands in that County belonging to these incompetent Tennesseans *is void on the face of the record* are cited in the "Brief of Petitioners" "Point One," page 27 hereinafter.)

The point is there made that "jurisdiction," as such, cannot be conferred by consent, by waiver or estoppel and that the Constitution and statutes of the State of Arkansas never conferred upon the Probate Court of Crittenden County any such jurisdiction over the lands of these *non-resident* incompetents as it assumed to exercise over petitioners' lands in that County. Hence their insistence that the parties are, as the Supreme Court of Arkansas expressed it in the case of *Hyde* v. *McNeely*, (See "Brief of Petitioners," page 40 hereinafter) in the same position as though "no action had been taken" in Crittenden Probate.

(The only answer to that proposition which the defendants have thus far been able to suggest is that perhaps the necessitous supplications of petitioners' domiciliary guardians gave the Probate Court of Crittenden County a "jurisdiction" which the Constitution and statutes of Arkansas did not confer upon it.)

In an effort to justify the District Court's dismissal of the "complaint" on motion "for want of jurisdiction," the defendants made two basic contentions which were

stated by the Eighth Circuit in its opinion on the First Appeal (page 3, last paragraph) as follows:

> "1. that the cause of action alleged in the complaint is exclusively within the jurisdiction of the Probate Court of Crittenden County, Arkansas, and
>
> "2. that this suit is barred because there is 'another action pending' in the Probate Court of Crittenden County, Arkansas, involving the same parties and the cause of action."

There can be no doubt but that the second of these contentions is based on the petition filed by petitioners in the Probate Court of Crittenden County, Arkansas, November 2, 1949, which petition is to be found at page 26 of the record on the First Appeal.

The Eighth Circuit overruled the first of these contentions and in partially sustaining the second, said:

> "..... WITHOUT DISMISSING that proceeding, plaintiffs now contend that the Probate Court is without jurisdiction. Plaintiffs cannot thus maintain such CONTRADICTORY POSITIONS at the same time" (Capitals supplied).

and held that the action in federal court, insofar as it seeks to recover from the defendant James C. Hale and his surety, National Surety Corporation, *funds in the hands of defendant Hale as "curator,"*

> "..... should be abated until the action against him pending in the Probate Court of Crittenden County, Arkansas, is DISPOSED OF in that court, or for a reasonable length of time" (Capitals supplied).

The opinion, especially when read in the light of the record and briefs on the previous appeal, makes it apparent that otherwise "Curator" Hale and his surety are in the same situation as his tenant and the other defendants,

i. e., subject to action in federal court for money judgments. It is likewise clear that the reason for temporarily and partially abating the action against Hale and his surety is the "contradictory positions" assumed (inadvertently) by petitioners in filing their complaint in federal court "without dismissing" the petition filed in Crittenden Probate on November 2, 1949.

To rectify that inadvertent assumption of "contradictory positions," and to relieve the defendants of all burdens consequent thereupon, petitioners, on November 8, 1950, obtained from the Clerk of the Probate Court of Crittenden County, Arkansas, a bill for all costs incident to the filing and service of, and response to, the petition filed in that court on November 2, 1949, paid same and wrote the judge of that court advising him of the fact, enclosed a printed copy of the Eighth Circuit's opinion on the first appeal, and an order dismissing that petition with the request that it be entered (Second Appeal, R. 2-4). But the defendants then reversed their position that the pendency of the petition of November 2, 1949, was prejudicial to them and maintained that its dismissal would be prejudicial:

By way of response to that application to dismiss the petition of November 2, 1949, defendant John Fogleman, who represents his law partner and co-defendant, Mr. Hale and Hale's surety in the proceeding in Crittenden Probate—wrote the judge of that court on November 11, 1950, objecting to the entrance of the proffered order—or any order, dismissing that petition. In making it plain that the proof had not been closed he reduces to absurdity the insistence that there had been any "final submission" of the petition filed November 2, 1949. He said:

> "There the matter was heard by Your Honor and although the hearing was conducted in an informal

> manner, the Court took the matter under submission and required that the petitioner furnish complete evidence as to all income received by Hurt as guardian and as to all allowances made to him for compensation and to Mr. Turley for compensation as his attorney. THE COURT FURTHER STATED AT THAT TIME THAT BEFORE THE MATTER WAS FINALLY DISPOSED OF THAT PETITIONER WOULD BE REQUIRED TO FURNISH DEFINITE PROOF AS TO THE ACREAGE IN THE LANDS OF THE REDDITT INCOMPETENTS as this was a matter that this Court was materially concerned with in that the Curator was an officer of this Court and the property was administered under the orders of this Court" (Second Appeal, R. 7) (Capitals supplied).

Under date of November 15, 1950, petitioners' attorney was advised by the Clerk of the United States District Court at Jonesboro, that a "hearing on mandate" had been set in that court for 9 a. m. on November 28, 1950 (Second Appeal, R. 2-3).

But meanwhile, their attorney had received no reply or response of any kind to his letter of November 8, 1950, to the judge of the Probate Court of Crittenden County, Arkansas, and no advice as to whether the order dismissing the petition of November 2, 1949, had been entered.

Such advice was awaited until the last moment when, under the "Rules of Civil Procedure," they could present these developments to the District Court for consideration at the "Hearing on Mandate" set in that court for Novem- 28, 1950, and on November 22, 1950, petitioners filed and served for that purpose the affidavit of their guardian, *et cetera,* Bennett H. Hurt, with the letters referred to above exhibited thereto, and filed and served a motion asking that the District Court consider these developments, especially the opposition of defendants to the dismissal of the very petition on the basis of the pendency of which they

had prevailed upon the Eighth Circuit to partially and conditionally abate the federal court action as to Hale and his surety (Second Appeal, R. 1-2-4-8).

On Saturday, November 25, 1950, petitioners' attorney received the first and only response from that Court or its judge to his letter of November 8, 1950:

A letter from the Reporter of the Probate Court of Crittenden County, Arkansas, saying that the Judge was ill and will "hear your matter in the above styled case" at Marion, Arkansas, on December 15th (Second Appeal, R. 8-9).

On November 27, 1950—the day before the "hearing on mandate"—petitioners' attorney called and talked by long distance telephone to the Reporter and was advised that the Judge continued ill and would not be back in his office "before the end of this week" (Second Appeal, R. 9).

Cognizant then and now that there had been no "final submission" of their petition filed November 2, 1949, because, as Mr. Fogleman's response to their application to dismiss shows (Second Appeal, R. 7), the proof had not been closed, and consequently, that they were entitled to dismiss it as a matter of right, upon payment of costs, plaintiffs' attorney and their guardian, *et cetera*, Bennett H. Hurt, thereupon went to the office of A. B. Carter, Probate Clerk, in the Crittenden County Courthouse at Marion, Arkansas, acquainted him with the events detailed above, called his attention to applicable sections of the Arkansas Statutes permitting a plaintiff or his attorney

> "to dismiss any suit pending in any of the courts in this state except actions in replevin, in vacation, in the office of the Clerk, on payment of all costs that may have accrued therein" (Title 27, Section 1406, Arkansas Statutes of 1947, Annotated).

and to the pertinent decisions of the Arkansas Supreme Court holding that a voluntary dismissal in such circumstances is a matter of right and especially calling his attention to the fact that all costs incident to the petition filed in that court on November 2, 1949, had been paid (Second Appeal, R. 9).

The Clerk declined to enter the dismissal, saying that he would do so only upon presentation of an order signed by Judge Francis Cherry or by Judge C. M. Buck (Second Appeal, R. 9).

A long distance call to the office of Judge C. M. Buck at Blytheville elicited the information that he was engaged in the trial of a case at Paragould. The call was transferred there and it was reported that Judge Buck was engaged in the trial of a case and was "not available" (Second Appeal, R. 9).

These developments, and "Plaintiff's Motion Concerning Judgment on Mandate" (Second Appeal, R. 1), were, properly and without objection presented to the District Court at the hearing on November 28, 1950. (See affidavit of Bennett H. Hurt and exhibits and supplementary affidavit (Second Appeal, R. 2-4-6-8) and the transcript at that hearing (Second Appeal, R. 10, *et seq.*).)

But His Honor, the District Judge at Jonesboro, brushed aside the inconsistency of defendants Hale and his surety in opposing the dismissal of the petition filed in Crittenden Probate on November 2, 1949, disregarded the proposition that the steps taken by plaintiffs in the office of the Clerk of the Probate Court on November 27, 1950 (Second Appeal, R. 14), were, in the circumstances, a dismissal of that petition under the Arkansas Statutes and decisions and in response to the question:

> "..... Had we dismissed that petition before this matter was heard in the Eighth Circuit or so that was reflected by the record at the time this opinion was written, would the action have been abated as to Hale and his surety?"

said

> "Well, it looks like it would. ....." (Second Appeal, R. 18).

The "Order on Mandate" was entered accordingly and the Second Appeal followed, with the result stated above. The Eighth Circuit held:

> "The question whether the proceedings in the Probate Court of Crittenden County, Arkansas, referred to in our former opinion, have been terminated, as appellants claim, is not before us on the appeal."

Any doubt that the "proceedings" to which that Court refers is the petition of November 2, 1949 (the only proceedings in Crittenden Probate over which petitioners had the least vestige of control), may be readily dispelled by a perusal of the Eighth Circuit's opinion on the First Appeal (184 F. 2d 443).

Petitioners thereupon filed a motion to require defendants Hale, individually and as "curator," and his surety, National Surety Corporation, to put in their answers and proceed to trial (Third and Fourth Appeals, R. 1).

To that motion was appended a certified copy of an order entered in Crittenden Probate on December 15, 1950, dismissing the petition of November 2, 1949 (Third and Fourth Appeals, R. 2-3).

Defendants countered with a motion to dismiss saying, in effect, that if the dismissal of the petition of November

2, 1949, was a voluntary dismissal, petitioners have abandoned their "remedies" in the State Court or, in the alternative, that the dismissal of that petition is *res judicata* (Third and Fourth Appeals, R. 3-4).

Meanwhile, the other defendants filed a motion for summary judgment under Rule 56 (Third and Fourth Appeals, R. 13). Though entirely formal and general in its terms, that motion, as will hereafter be apparent, is based on the contention that the dismissal of the petition of November 2, 1949, is *res judicata* as to these defendants, too, even though they were not parties thereto.

In an effort to bolster their *res judicata* contention, defendants append thereto the affidavit of Francis Cherry, who was then Judge of the Probate Court of Crittenden County, Arkansas, but who has lately been elected Governor of that State, wherein he does not deny—as defendant Fogleman admits in his response on behalf of his law partner and codefendant Hale and Hale's surety to petitioners' application to dismiss petition of November 2, 1949 (Second Appeal, R. 7)—that *the evidence was not closed* when that petition was informally discussed with him in chambers at Jonesboro on January 10, 1950, but insists, nevertheless, that "the petition was taken under submission" on that occasion.

Though his affidavit neglects to mention—as defendant Fogleman's response (Second Appeal, R. 7) admits, that at Jonesboro on January 10, 1950, Judge Cherry not only did not hear the evidence on the petition but made on that occasion the anomalous requirement that *petitioners* "furnish definite proof as to the acreage in the lands of the Redditt incompetents"—lands which for years, had been rented under the egis of his Court—it, nevertheless, is discernible from the last paragraph thereof—as defendant

Fogleman likewise makes plain—that the petition of November 2, 1949, could not have been "finally submitted"—in any legal sense—on that occasion for the simple reason that not even the proof in chief in support of the petition had been introduced.

Defendants filed two affidavits in opposition to the motion for summary judgment (Third and Fourth Appeals, pages 16 and 19, *et seq.*). Those affidavits confirm defendant Fogleman's admissions in his response on behalf of his law partner and codefendant Hale and Hale's surety (Second Appeal, R. 7) that the proof in chief in support of the petition of November 2, 1949, was not closed at the "hearing" thereon at Jonesboro on January 10, 1950. Moreover, in giving a simple and plain account of what happened and when, those affidavits bespeak to the initiated more than a hint of the "run around" which petitioners and their petition of November 2, 1949, received in Crittenden Probate.

But what is perhaps more significant, they point out that the "curator," who controls the only source of income which these incompetent petitioners have, has made no transfer of funds to their domiciliary guardian since 1949, with the result that their guardian has been reduced to the temporary expedient of borrowing from the small surplus in the account of Aquilla Redditt, who is in the State Hospital for the Criminal Insane, at Nashville, to provide the necessities of life for the other two incompetent petitioners (Third and Fourth Appeals, R. 18-19 and 29).

Furthermore, that Judge Cherry has entered an order that

> "..... *no transfer of funds* or investments be made and that no hearing be had or any accounting until further orders of this Court."

and that he stated from the bench that

> "I don't want to hear anything else on this case as long as it is in Federal Court. I am going to let it sit" (Third and Fourth Appeals, R. 18 and 29).

In the light of Judge Cherry's thinly veiled purpose of starving these incompetent petitioners into submitting their rights to his assumed jurisdiction, it is interesting to note that though a certified copy of the "complaint" in this cause (First Appeal, R. 2-13) has been on file in court since shortly after February 6, 1950 (Third and Fourth Appeals, R. 24), and that he says that he himself raised at Jonesboro on January 10, 1950, the question that perhaps petitioners' lands were being rented on an inadequate acreage basis, Judge Cherry has not (as of December 6, 1951) done anything toward investigating, or remedying even the manifold improprieties in the "curatorship" proceeding which are apparent from his court's own records (Third and Fourth Appeals, R. 28-29).

Nevertheless, the District Judge at Jonesboro sustained defendants' motions to dismiss and for summary judgment and again dismissed the "complaint" at petitioners' cost as to all defendants.

At first glance, it would seem that his reasons for so doing root in the assumption that in denying petition for mandamus (*Redditt* v. *Trimble, Judge*, 186 F. 2d 716) before the Second Appeal, the Eighth Circuit had, by implication amended its opinion on the First Appeal by writing in a requirement that these petitioners would have to exhaust whatever remedies are (theoretically) available to them in the State Courts before they are entitled to have the federal courts exercise in their behalf the *jurisdiction* which the Eighth Circuit found the federal courts to have, opinions to the contrary notwithstanding. Consequently,

that by dismissing their petition of November 2, 1949, petitioners abandoned the State Court remedies available to them, theoretically, and thereby deprived the federal courts of jurisdiction.

But a more careful examination of the memorandum opinions of the District Judge will show that these most recent summary dismissals are principally based either on the proposition that the order dismissing the petition of November 2, 1949, is *res judicata* of the issues raised herein, or on the assumption that a "complaint" is subject to dismissal on motion (under Rules 12 or 56) unless petitioners plead in detail every fact necessary to entitle them to recover against each defendant under a rule or rules of law which petitioners must precisely point out (Third and Fourth Appeals, R. 5 and 31, *et seq.*).

In an opinion by Circuit Judge Riddick, of Little Rock, Arkansas, the Eighth Circuit—on October 29, 1952—affirmed.

The inconsistencies in principles and results between that opinion and the opinion filed by the Eighth Circuit on October 17, 1950 (184 F. 2d 443), are too obvious to require further comment but it would be illuminating to examine briefly the rationale and result of the Eighth Circuit's most recent adjudication:

By dismissing the petition of November 2, 1949—a petition which the Eighth Circuit held on the First Appeal to afford basis only for *partially* and *temporarily abating* this action as to *two* of the defendants; a petition under which petitioners could have secured an accounting only as to those *two defendants,* and that only *if the Judge of Crittenden Probate—in his discretion*—saw fit to *grant the petition*—these non-resident incompetent petitioners are compelled by means of a "curatorship" proceeding which is

void on the face of the record for want of jurisdiction of either subject matter or necessary parties to accept $1,400.00 per year for a plantation having a fair rental value of $9,000.00 per year.

And all that is accomplished without citation of a single constitutional provision or statute of the State of Arkansas conferring upon Judge Francis Cherry's court any such jurisdiction as it undertook to exercise in depriving these petitioners of both the use and fair rental value of their plantation in the face of numerous decisions of the Supreme Court of Arkansas that the probate courts of that State have no such jurisdiction (See "Brief of Petitioners," "Point One," page 27 hereinafter).

All that is accomplished in the face of a record which shows conclusively that the Probate Court of Crittenden County never even attempted in that "curatorship" proceeding to adjudicate as to the rights of petitioner *Mildred Ion Redditt,* who was then a one-fourth, and is now a one-third, cotenant in that plantation and leaves considerable doubt as to whether the court exercised effectively whatever jurisdiction it had as to petitioner *James Williford Redditt,* who also owned a one-fourth, and now owns a one-third, undivided interest in that plantation:

The record shows (First Appeal, R. 22 and 23) that the petition and order under which Curlin was appointed "curator" show on their face that he sought to be, and was, appointed only for the lands of *"Aquilla, J. W., Jr., Mary Lou* and *Ernest Redditt"* (Mary Lou Redditt had been dead 9 years when that petition and order were filed and entered (First Appeal, R. 4). So far as this record shows, there never was a "J. W., Jr." among the children of Greenberry Redditt who are the owners of this property). How an adjudication as to them could affect the

rights of the petitioners Mildred Ion Redditt and James Williford Redditt, who are the owners in co-tenancy of two-thirds of this plantation, is left unexplained.

And by the simple expedient of making the gratuitous assumption that "The facts are not in dispute," this is all accomplished in a federal court—ostensibly in conformity with the "Rules of Civil Procedure"—by a dismissal of the complaint on motion.

REASONS FOR GRANTING THIS PETITION.

Aside from the painfully apparent fact that to refuse this petition is, in the circumstances, to leave these incompetent petitioners remediless in the face of a palpable fraud which the necessitous supplications of their domiciliary guardian could not, and cannot, sanctify or even legitimate (a fact which becomes especially significant when it is realized that the very mode and nature of the adjudication below forecloses whatever remedies might ever have been theoretically available to petitioners in the State courts); aside from the alleged fraud and the obvious lack of essential parties and necessary process, the reasons for granting this petition are these:

1. The Eighth Circuit has decided in this case an important question of local law in conflict with applicable local decisions in that by holding to be valid the "curatorship" proceeding in the Probate Court of Crittenden County, the Eighth Circuit has conferred upon the Probate Courts of Arkansas a jurisdiction which, in the absence of a Constitutional provision or Statute expressly conferring it, is inherent only in courts of general equity jurisdiction, i. e., jurisdiction to appoint what is, in effect, a RECEIVER for lands in that State belonging to incompetents resident and under guardianship in another State. Either

that, or it has discovered in the necessitous supplications of the Tennessee guardian of these incompetent petitioners, including the petition of November 2, 1949, a unique method of conferring upon inferior courts jurisdiction of subject matter which the law of the sovereignty which constituted those courts has seen fit to deny (a method which the Supreme Court of Arkansas has never held to be an effective or satisfactory substitute for a constitutional or statutory grant of jurisdiction) (See "Brief of Petitioners," "Point One," page 27, hereinafter).

2. The Eighth Circuit has decided in this case a federal question in a way probably in conflict with applicable decisions of this Court in that by simply (and erroneously) hypothesizing that "the facts are not in dispute," it has set at naught the established practice that a complaint cannot rightly be dismissed on motion under Rule 12 or Rule 56 unless the court is prepared to say—as a matter of law—that plaintiffs are entitled to no relief upon proof of the allegations of their complaint, and all facts properly provable in support thereof. And certainly this Court is not prepared to say that about the complaint in this case (First Appeal, R. 2-13).

Thus the decision below, if permitted to stand, would not only work a flagrantly unjust result in the instant case, but would play havoc with several vital fields of the law of the State of Arkansas, unsettle the evolving certitude as to the practice under Rules 12 and 56 and at the same time open the door to an iniquitous method for denying a hearing "on the merits" to plaintiffs who find themselves situated, as do these petitioners, where the federal courts are the only tribunals to which they can turn to assert their rights.

WHEREFORE, it is respectfuly submitted that this petition for writ of certiorari to review the judgment of

the Circuit Court of Appeals for the Eighth Circuit should be granted.

THOMAS F. TURLEY, JR.,
Sterick Building,
Memphis 3, Tennessee,
Attorney for Petitioners.

HAL B. MIXON,
Marianna, Arkansas, and
EDWARD P. RUSSELL,
Union Planters Bank Building,
Memphis 3, Tennessee,
Of Counsel for Petitioners.

State of Tennessee, County of Shelby.

Bennett H. Hurt makes oath that he is the domiciliary guardian, *et cetera,* of Aquilla Redditt, James Williford Redditt and Mildred Ion Redditt, *non compos mentis,* and the domiciliary administrator of the Estate of Ernest Redditt, deceased, and that the statements made in their foregoing petition for certiorari are true to the best of his knowledge, information and belief.

Bennett H. Hurt,

Subscribed and sworn to before me this January 2, 1953.

Louise Howell,
Notary Public.

My Commission Expires July 12, 1953.

BRIEF OF PETITIONERS.

1. STATEMENT OF THE CASE.

These incompetent, non-resident petitioners are the owners of a valuable plantation in Crittenden County, Arkansas. They assert that by means of a "curatorship" proceeding in the Probate Court of Crittenden County, Arkansas, which is void on the face of the record for want of jurisdiction of either subject matter or necessary parties, the defendants—pursuant to a fraudulent scheme—have compelled them for several years to accept an average of $1,400.00 for their plantation which, they say has a fair rental value of over $9,000.00 per year. Hence, they assert that defendants and all who profited by, or participated in, that illegal, and allegedly fraudulent, deprivation are liable as trespassers or as trustees *ex maleficio.*

The Eighth Circuit, on October 29, 1952, affirmed the dismissal of their complaint (First Appeal, R. 2-13) on motion and petitioners here seek a review of that decision under Title 28, Section 1254, of the United States Code, all of which will more fully appear from their petition for certiorari, which precedes this brief under the same cover and index and is incorporated herein by reference.

2. ASSIGNMENTS OF ERROR.

1. For the reasons elaborated under "Reasons for Granting this Petition" (page 22 hereinbefore), and under the authorities cited under "Point One" (page 27 hereinafter), the Eighth Circuit erred in holding that petitioners are bound by the "curatorship" proceeding in the Probate Court of Crittenden County, Arkansas, under the egis of which proceeding they were deprived of both the use and fair rental value of their Arkansas plantation. Neither the pendency nor the dismissal of the petition of November 2, 1949 (First Appeal, R. 26), alters that proposition.

2. For the reasons elaborated under "Reasons for Granting this Petition" (page 22 hereinbefore), and under the authorities cited under "Point Five" (page 52, hereinafter), the Eighth Circuit erred in holding that petitioners' complaint (First Appeal, R. 2-13) can rightly be dismissed in the circumstances under either Rule 12 or Rule 56 of the "Rules of Civil Procedure."

3. POINTS AND AUTHORITIES.

Point One: Under its inherent jurisdiction to appoint receivers, a court of general equity jurisdiction doubtless has jurisdiction to appoint some suitable person to take over and preserve property in its state belonging to a non-resident incompetent when such an appointment is necessary in the circumstances to prevent the loss or dissipation of the incompetent's estate. Certain it is, however, that no other court has such jurisdiction in the absence of a constitutional provision or statute expressly conferring it.

When this "curator" was appointed, Arkansas had chancery courts. Yet here we have a case where a probate court—an inferior court, which is the statutory successor of, and had only the jurisdiction historically exercised by, county courts—assumed to itself the jurisdiction and prerogatives of a court of general equity jurisdiction (and more) by undertaking to appoint what was, and is, in effect, a receiver for lands in its county belonging to non-resident incompetents who were under guardianship in another state.

Aside from the lack of process or notice of any kind to the incompetent owners or their domiciliary guardian, who had for years been managing their lands in Arkansas pursuant to the laws of that state, and aside from the palpably fraudulent scheme in which that appointment played so significant a part, that "curatorship" proceeding was, and is, coram non judice and void on the face of the record for the reason that the Constitution or Statutes of Arkansas never conferred upon the Probate Court of Crittenden County any such jurisdiction as it then undertook to exercise.

Respondents said in their brief below that:

> "The basic question involved in this lawsuit is whether the Probate Court of Crittenden County had jurisdiction to appoint Curlin curator of the estate of the Redditts and Hale curator in succession."

They then asserted that

> "..... appellants' rights have long since been lost, if they ever had any, by orders of the probate court approving the acts of the curators ....."

and concluded that

> "Therefore, the first question to be determined is the jurisdiction of the probate court."

This "basic question" comes into this litigation thus:

The "complaint" of these petitioners (First Appeal, R. 2-13), who the record shows have been residents of Tennessee all their lives and under guardianship there since 1924, details how their Uncle, J. E. Williford, who had lost his plantation by foreclosure and had been renting theirs from their Tennessee guardian, was being sued in Tennessee for the three years' rent he was in arrears, when their Uncle's "close friend and political associate, Howard Curlin, Sheriff of that County," procured the appointment of himself as "curator" of appellants' lands in Crittenden County and proceeded to rent them to appellants' Uncle without his being under the necessity of paying or securing the three years' rent he was in arrears. Indeed, so the "complaint" alleges, the "curator" even procured a "waiver" of the current year's rent (First Appeal, R. 2-13).

The "complaint" then continues thus:

> "The incompetent owners of this property were never residents of Crittenden County, Arkansas. As

> the records of the Probate Court of that County in the cause referred to above clearly show, no effort whatsoever was made by process or otherwise to notify them of the pendency of the proceeding. No guardian *ad litem* was appointed to protect their interests, though the court's own records showed them to be *non compos mentis. The proceeding whereby their lands were permitted to remain in the hands of their rapacious uncle was conducted ex parte in a court devoid of jurisdiction either over the subject matter or the necessary parties*" (First Appeal, R. 9) (Italics supplied).

Respondents conceded in their brief below that they had been unable to find a constitutional provision or statute of the State of Arkansas conferring upon the probate courts of that State any such jurisdiction as the Probate Court of Crittenden County assumed to exercise in appointing a "curator" for the lands in that county belonging to these incompetent petitioners who were, and are, residents, and under guardianship in, Tennessee. Nor did they cite a single decision of an Arkansas appellate court which even inferentially says that Crittenden Probate had any such jurisdiction.

Doubtless realizing the inadequacy of their adroit efforts to show in an inferior court—a court which is the statutory successor of, and had only the jurisdiction historically exercised by, the county courts—jurisdiction of subject matter which on reason and authority—in the absence of an express constitutional or statutory grant of such jurisdiction—is vested in, and exercisable by (and only by), a superior court of general equity jurisdiction, *i. e.*, jurisdiction to appoint a receiver in certain rare instances for lands in the state belonging to non-resident incompetents, the respondents sought below to bolster their anomalous contention on this "basic question" by saying that

> "_____ there may be some doubt about the matter"

but that having chosen to litigate in federal court

> "_____ an obscure and technical question of Arkansas law"

petitioners

> "_____ should not now complain to this court that the Arkansas federal judge differed with their views."

The Eighth Circuit evidently had no better success in finding authority to support the conclusion that the Probate Court of Crittenden County, Arkansas, had any such jurisdiction as it undertook to exercise in appointing a "curator" for the lands of these petitioners, because certain it is that the Eighth Circuit cites not a single constitutional provision nor statute conferring such jurisdiction (nor a single decision wherein an Arkansas appellate court ever held that such jurisdiction existed). As a comparison of its opinion with the authorities hereinafter cited (and which the Eighth Circuit studiously avoided even mentioning) will show, the Eighth Circuit based its decision on this vital issue upon the holding of the District Judge who himself cites no authority to support his decision.

In answering this "basic question"—this "first question to be determined," the petitioners shall make two fundamental assumptions, and only two: 1st, That the law of Arkansas is not determinable in this court by the chimerical and subjective factor of personality, and 2nd, That all that is, or should be, significant in the law of Arkansas is knowable and recorded in the constitution, statutes and decisions of the appellate courts of that state. If those

sources do not show that the Probate Court of Crittenden County had jurisdiction to appoint what was, and is, in effect, a receiver for the lands of that county belonging to the incompetent Tennesseans who are the plaintiffs and petitioners herein, it shall be their insistence that the so-called "curatorship" proceedings is *coram non judice* and *void on the face of the record,* a fatal defect—going as it does to the jurisdiction of the subject matter—*a defect which cannot be cured by consent, by waiver, or estoppel even by persons sui juris and certainly not by incompetents under guardianship in another state.*

Counsel for petitioners was, and is, persuaded after exhaustive research that respondents' contentions below are irretrievably foreclosed by the case of *Patton* v. *Taylor* (144 Ark. 254, 222 S. W. 49), holding that except for jurisdiction to approve a sale upon application of the domiciliary guardian, *the probate court of Arkansas had no jurisdiction whatsoever over lands in that State belonging to non-resident incompetents and could acquire none by appointing a resident guardian or "curator."* Respondents' efforts to disregard that case and in the face of their own admission

> "There was no provision in the Arkansas statutes in effect in 1933 defining the manner in which a curator is to be appointed in this State for a non-resident insane person"

to conclude from such as that that such jurisdiction must have been vested in the probate courts is of a pattern with the Eighth Circuit's failure to even mention *Patton* v. *Taylor* in its opinion and with its citing as its only authority for its decision (except the unsupported holding of the District Court) an ancient Arkansas case saying that *"within the limits of the jurisdiction conferred upon them by the Constitution and statutes of the State* ——————"

judgments of the probate courts of Arkansas "import absolute verity."

Nevertheless, counsel for petitioners has again researched the question and is still convinced that *Patton* v. *Taylor* (144 Ark. 254, 222 S. W. 49) is determinative, but to dispel all doubts on the subject, counsel would present for the Court's consideration the highlights of that research without burdening the Court with the literally hundreds of cases, acts, *et cetera,* examined in its course.

Before proceeding to examine fully the constitutional provisions, statutes and decisions of the appellate courts of Arkansas to determine what, if any, jurisdiction the Probate Court of Crittenden County had over lands in that county belonging to incompetents resident and under guardianship in another state, two recent cases will serve to make indelibly plain the general proposition that the *probate courts of Arkansas have only such special and limited jurisdiction as is expressly conferred upon them:*

The Probate Court of Conway County undertook to appoint a "curator" for the estate of a *resident* minor and to approve settlement by the "curator" of the minor's claim for personal injuries. A proceeding was subsequently commenced to set aside for fraud the order of the probate court approving the settlement. The Supreme Court held that it was unnecessary to determine whether fraud was practiced. It held that the judgment was void on the face of the record because the probate court had no jurisdiction of the subject matter and said:

> "In speaking of the powers granted probate courts, this court said: 'The most important interests, the guardianship of widows, children, and estates are committed to their superintending care. Some, possibly, are dishonest. Many are not wise or discriminating. Taking into account the magnitude of the property interests which they have in charge, these courts

should be required to proceed in exact conformity to law, instead of being panoplied by the presumptions which attend the exercise of superior jurisdiction by other courts.' *Apel* v. *Kelsey,* 52 Ark. 341, 12 S. W. 703, 704, 20 Am. St. Rep. 183.

"It has been repeatedly held that it was not the purpose of the constitutional and statutory provisions to invest the probate court with jurisdiction of contested rights and matters of litigation as to the title of property as between the executor or administrator and others. *Francher* v. *Kenner,* 110 Ark. 117, 161 S. W. 166; *Moss* v. *Sandefur, Executor,* 15 Ark. 381; *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39. 'It is well to remember that these tribunals have only such special and limited jurisdiction as is conferred upon them by the constitution and statutes and can only exercise the powers expressly granted, and such as are necessarily incident thereto.' *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S. W. 373, 374; *Union and Mercantile Trust Co.* v. *Hudson,* 147 Ark. 7, 227 S. W. 1; *Paget* v. *Brogan,* 67 Ark. 522, 55 S. W. 938; *Shane* v. *Dickson,* 111 Ark. 353, 163 S. W. 1140."

Moss v. *Moore,* (1931-32) 184 Ark. 798, 44 S. W. 2d 825.

The probate court of Garland County undertook to decide the ownership of jewelry claimed as a gift *inter vivos* from a testatrix. The Supreme Court held that the order was void and should have been quashed by the Circuit Court:

"In *Lewis* v. *Rutherford,* 71 Ark. 218, 72 S. W. 373, we held that probate courts have only such special and limited jurisdiction as is conferred upon them by the constitution and statutes, and can only exercise the powers expressly granted and such as are necessarily incident thereto. The Constitution of 1874 did not enlarge the jurisdiction of probate courts, and, since these are courts of limited and special jurisdiction, the jurisdiction would not extend beyond the

constitutional limits. *Hart* v. *Wimberly,* 173 Ark. 1083, 296 S. W. 39. Indeed, it is the general rule that probate courts have no jurisdiction as to any subject except that expressly or by necessary implication given by the Constitution and statutes.

" 'But extensive and important as this jurisdiction (that of probate courts) is, it is very different from that of courts of really general law or equity jurisdiction, which it is said is "undefined, general, like space, ending nowhere, and embracing all that is." It is limited in its general scope, as to subject matter, to the undisputed property of decedents and of wards, and, as to persons, to those interested in such property, as equitably or legally entitled to some distributive share therein, or in the residue, and to creditors who voluntarily, upon general notice and without citation, present their claims. All controversies between executors, administrators or guardians, or those interested in the particular estate, and other persons not interested in it, must be settled in another forum (Section 23, p. 20, Gary's Probate Law, 3d Ed.).'

"From all the cases it would seem that the rule as to jurisdiction of subject matter is substantially as stated in Massachusetts by Chief Justice Parson nearly a century ago: 'When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which some court of probate has jurisdiction, then, if he mistakes, the means of correcting such mistake is by appeal. But when the question is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. *If he errs in assuming a jurisdiction which does not belong to the probate court, his acts are void.*' Section 34, Gary's Probate Law. *Mobley* v. *Andrews,* 55 Ark. 222, 17 S. W. 805; *Stewart* v. *Lohr,* 1 Wash. 341, 25 Pac. 457; *In re Woolford,* 10 Kan. App. 283, 62 Pac. 731; *Bolander's Estate,* 38 Ore. 490, 63 Pac. 689; *Falke* v. *Terry,* 32 Colo. 85, 75 Pac. 425; Works on Courts and Their Jurisdiction, p. 440.

"In the recent case of *Moss* v. *Moore,* 184 Ark. 798, 44 S. W. 2d 825, the principles announced were recognized and reaffirmed."

Huff v. *Hot Springs Savings Trust Guaranty Co.,* (1932) 185 Ark. 20, at 28, 45 S. W. 2d 508, at 511.

Also in:

Myrick v. *Jacks,* (1878) 33 Ark. 425.

Myer v. *Rousseau,* (1886) 47 Ark. 460.

Hart v. *Wimberly,* (1927) 173 Ark. 1083, 296 S. W. 39.

Smith v. *Walker,* (1933) 187 Ark. 161, 58 S. W. 2d 946.

Here are the constitutional provisions on that subject:

Constitution of 1836, Article VI, Sec. 10:

"There shall be elected by the justices of the peace of their respective counties a presiding judge of the county court to be commissioned by the governor, and to hold his office for two years and until his successor is elected and qualified. He shall, in addition to the duties that may be required of him by law as the presiding judge of the county court, be a judge of the court of probate, and shall have such *jurisdiction in matters relative to the estates of deceased persons, executors, administrators and guardians as may be prescribed by law, until otherwise directed by the general assembly*" (Italics supplied).

Constitution of 1864, Article VII, Sec. 12:

"The qualified voters of each county shall elect a county and probate judge, who shall hold office for two years and until his successor is elected and qualified. He shall in addition to the duties that may be required of him by law as presiding judge of the county court, be a judge of the court of probate, and have such *jurisdiction* in *matters* relating to the

estates of deceased persons, executors, administrators and guardians as may be prescribed by law, until otherwise directed by the general assembly" (Italics supplied).

Constitution of 1868, Article VII, Sec. 5:

"The inferior courts of the state as now constituted by law, except as hereinafter provided, shall remain and with the *same jurisdiction as they now possess. Provided,* that the *general assembly may provide for the establishment of such inferior courts, changes of jurisdiction or abolition of existing inferior courts as may be deemed requisite* ....." (Italics supplied).

The General Assembly abolished the probate courts of Arkansas by the Act of April 17, 1873, and transferred their jurisdiction to the Circuit Courts, but they were reconstituted under the following section from the Constitution of 1874:

Constitution of 1874, Article VII, Sec. 34:

"The judge of the county court shall be the judge of the court of probate and have such exclusive, original *jurisdiction* in *matters relative to the probate of wills,* the administration of *estates of deceased persons, executors, administrators, guardians and persons of unsound mind as is now vested in the circuit courts, or may hereafter be prescribed by law.* The regular terms of the court of probate shall be held at the times that may hereafter be prescribed by law" (Italics supplied).

Sec. 35: "Appeals may be taken from judgments and orders of the probate courts to the Circuit Court under such regulations and restriction as may be prescribed by law."

As to the effect of this abolition and restoration on the jurisdictions of the probate courts see:

"At the time of the adoption of this Constitution, the Probate Courts had been abolished and their jurisdiction had been transferred to the Circuit Court. *The constitutional convention intended to restore the Probate system as it existed under the Constitution of 1836* and to reinvest in them the same jurisdiction in matters pertaining to the administration of estates, which had formerly belonged to them, but which since their abolition was exercised by the Circuit Courts."

Hall et al. v. *Brewer et al.*, (1883) 40 Ark. 433, at 441.

"..... Obviously, it was meant to relegate to the Probate Courts their old jurisdiction, without restriction or qualification. *The decisions of this court regarding their former power apply now.* Their *jurisdiction* has been simply elevated from a statutory to a constitutional basis; being as to limits *unchanged.*"

Reinhardt, Admr., v. *Gartrell*, (1878) 33 Ark. 727.

The Act of 1875, which is the basic act reestablishing the probate courts, under the Constitution of 1874, had this to say on the subject of their *jurisdiction in general*:

"The court of probate shall have original jurisdiction of the following cases (a):

"First: In all matters relating to the probate of last wills and testaments, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates.

"Second: In the settlement and allowance of accounts of executors, administrators and guardians.

"Third: To hear and determine all controversies respecting last wills and testaments, the rights of executorship, administratorship or guardianship.

"Fourth: To issue process and cause to come before such court all persons whom they may deem it

necessary to examine, whether parties or witnesses, or who as executors, administrators, or guardians, or otherwise, shall be interested or in anywise accountable for any lands, tenements, goods, chattels, moneys or effects belonging to any minor, orphan, or person of unsound mind, or to the estate of any deceased person."

Mansfield's "Digest of the Statutes of Arkansas," (1884).

The statutes dealing specifically with the jurisdiction of the probate courts over the persons and estates of insane persons make it plain that such jurisdiction extends only to *residents of the county.* The *procedure* which the statutes provide for the exercise of that jurisdiction (and which the Supreme Court of Arkansas has repeatedly held must be *strictly followed*) confirms that view and also obviously contemplates that no guardian be appointed until the alleged incompetent has been "brought before the court" and adjudged after a hearing to be insane. Those statutes, insofar as here pertinent, have remained substantially unchanged since the Revised Statutes of 1838.

"Sec. 3767: Probate courts *within their respective counties,* shall have jurisdiction to appoint, and possess a superintending control over, guardians to take the care, custody and management of idiots, lunatics, habitual drunkards and persons of unsound mind (a), who are incapable of conducting their own affairs and their estates real and personal, and to provide for the safekeeping of such persons, the maintenance of themselves and their families, and the education of their children *in the manner hereinafter provided.*

"Sec. 3768: If any person shall give information in writing to such court that *any person in his county* is an idiot, lunatic, or of unsound mind, and pray that an inquiry thereof be had, the court, if satisfied that

there is good cause for the exercise of its jurisdiction, shall cause the person so charged to *be brought before the court,* and *inquire into the facts by a jury, if the facts be doubtful.*

"Sec. 3769. Whenever any sheriff, coroner or constable shall discover *any person* to be of unsound mind *who resides in his county,* it shall be his duty to make *application to the court* for the exercise of its jurisdiction, and thereupon the *like proceeding shall be had* as in the preceding section directed.

"Sec. 3770. *If it be found by the jury that the person so brought before the court is of unsound mind,* or incapable of managing his own affairs, *the court shall appoint a guardian of the person and estate of such insane person.*"

Mansfield's "Digest of the Statutes of Arkansas," (1884) Secs. 3767, *et seq.*

Also see:

Kirby's "Digest of the Statutes of Arkansas," (1904) Secs. 4002, *et seq.*

Crawford and Moses "Digest of the Statutes of Arkansas," (1921) Secs. 5826, *et seq.*

Pope's "Digest of the Statutes of Arkansas," (1937) Secs. 7543, *et seq.*

Monks v. *Duffle* (163 Ark. 118, 259 S. W. 735) illustrates the proposition that it is essential even to the exercise of the limited jurisdiction over the estates and persons of *resident* incompetents, which has been conferred by the constitution and statutes upon the probate courts, *that the facts necessary to the exercise of that jurisdiction appear on the face of the record.* It also illustrates that in the exercise of even that limited jurisdiction, the probate courts must proceed in strict conformity with the statutes.

"..... Where the jurisdiction conferred upon a court must be exercised in a special manner, and not

according to the course of the common law, *it is necessary for the facts essential to the exercise of such jurisdiction to appear in the record. Oliver* v. *Routh,* 123 Ark. 189, 184 S. W. 843; *Massey* v. *Doke,* 123 Ark. 211, 185 S. W. 271; *Jones* v. *Ainell,* 123 Ark. 532, 186 S. W. 65. *The failure of the record to affirmatively show the presence of the appellant in court when the condition of her mind was inquired into renders the probate court void. The letters of guardianship must fall with the order."*

"The issue involved on this appeal is whether the court rightly acquired jurisdiction of the person of the appellant and her property, and not one in error of the exercise of jurisdiction rightfully acquired, so it was proper to raise it by collateral attack. The rule thus announced is not in conflict with the rule announced in *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S. W. 501, but on the contrary is in perfect accord with it. The error discussed in the Sharum case was one committed in the exercise of jurisdiction rightfully acquired. The necessity of having a person of unsound mind before the court in order to exercise jurisdiction over him and his property was recognized in that case."

Monks v. *Duffle,* (1924) 163 Ark. 118, 259 S. W. 735.

In *Hyde* v. *McNeely* (193 Ark. 1139, 114 S. W. 2d 1068), the Desha County Probate Court found Hyde to be a person of unsound mind and appointed McNeely as guardian of his person and curator of his estate. Hyde sued in Chancery to require McNeely to account, insisting that the probate court proceeding was void because the order did not recite that she was present at the hearing and had notice of the proceeding as required by Sec. 5829, Crawford and Moses Digest. The Supreme Court said:

"In the instant case, the probate court judgment of insanity being void, *appellant stands in the position*

of one against whom no action has been taken. ----------."

"It is argued that appellant's remedy is not in chancery, but that she should go back to the probate court. The answer to that argument is that in *legal contemplation she has never been in the probate court,* and there is nothing there to appeal from or to correct. ----------."

Hyde v. *McNeely,* (1937) 193 Ark. 1139, 104 S. W. 2d 1068.

Respondents insisted on the first appeal that the case of *Sanders* v. *Omohundro* (1942) (204 Ark. 1040, 166 S. W. 2d 657) is authority for their unsupported assertion that the above quoted sections and the numerous cases of the Supreme Court of Arkansas to the contrary notwithstanding, the jurisdiction of the probate court is not restricted to *residents,* but that the probate court not only could but did—on an *ex parte* application, without notice or process and without having petitioners here "before the court"—appoint a "curator" for the estates of these non-resident incompetents because the petition under which Curlin was appointed says that "one of them is now an inmate of the State Hospital at Bolivar, Tennessee" (First Appeal, R. 23).

That contention was exploded on the First Appeal, but it will take but a moment to show how misleading and fallacious it is:

That decision turns on the fact that the Act of March 11, 1905, p. 198 (Crawford and Moses Digest, Sec. 5837), made the one and only exception to the rule applied in *Monks* v. *Duffle* (163 Ark. 118, 259 S. W. 75) and *Hyde* v. *McNeely* (193 Ark. 1139, 104 S. W. 2d 1068), that the alleged incompetent must be "before the Court." But the express words of the act make it obvious that *applies only to residents*:

> "Whenever any insane person is confined in the *insane asylum* in this State, or in an institution or asylum for the insane outside the State, *the probate court of the county of which such person is a citizen* and *resident* shall have power to appoint a guardian for such person, without requiring the presence of such person before the Court."

The appointment of a guardian which was under scrutiny in that case was made by the probate court of Pulaski County for a RESIDENT of that county. And *it is not to be overlooked that only by means of a nunc pro tunc order specifically finding that the incompetent was at the time of the appointment* a RESIDENT of Pulaski County, *and that the institution where she was confined in Michigan was "an asylum for the insane" within the meaning of the act and section quoted* was it possible for the probate court to keep its appointment of a guardian even for her (a resident) from being "void on the face of the record" under the oft reiterated rule that the record must show that the respondent was "before the court" (See footnotes to the decision, 204 Ark. 1040, 166 S. W. 2d 657).

Note:

Though Act 108, of 1937, which is cited in the notes to the above quoted section in Pope's Digest (Section 7554), was enacted subsequent to the appointment of Curlin as "curator," lest further confusion be injected into this litigation by reference to that Act, petitioners would point out that it is simply a reenactment without substantial change in word or purpose. Indeed, an examination of the Act itself, especially Section 2, thereof, will show that the purpose of the Legislature in enacting it was to enable *"citizens of the State of Arkansas"* who are "now confined in insane asylums outside of this State," to be brought back home "where they could receive the care

and attention of those persons who are closely related by blood."

Respondents next endeavored by way of negative predicate to find some grant of jurisdiction by saying that *Patton* v. *Taylor* (144 Ark. 254, 222 S. W. 49)

"..... does not hold, either directly or by dicta, that the probate court lacks jurisdiction to appoint a curator to *manage, preserve* and *rent* the property of a non-resident insane person ....."

Petitioners invite the Court to read that case. There the Probate Court of Benton County undertook to appoint a "curator" for Amanda Taylor, who owned land in that county but who

> "had been a resident of Oklahoma for eight or nine years and was adjudicated insane and confined in the asylum at Vinita in said State."

Subsequent to that appointment, the "curator" sold Amanda's land and the probate court approved the sale.

Thereafter, Amanda was discharged from the asylum in Oklahoma and sued in the Chancery Court of Benton County, Arkansas, to set aside the probate proceedings and the "curator's" deed. The defendants insisted that Section 1, Act 77, Acts of the General Assembly of 1905 (quoted above in connection with *Sanders* v. *Omohundro,* relied upon by respondents), gave the probate court jurisdiction to appoint a "curator" for lands in its County belonging to an incompetent confined in an asylum. But in holding the probate proceedings and the deed void, the Supreme Court of Arkansas said:

> "The probate court of Benton County had no jurisdiction over the person or property of appellee and could acquire none by the appointment of a local guardian. Sections 1 and 2, Act 77, Acts, 1905, do not

> authorize the appointment of a guardian for an non-resident insane person nor the sale of one's property in this State by local guardian. Those sections only apply to insane citizens of this State confined in institutions or asylums for insane, either in or out of this State. _____"

If, as the Supreme Court there says in plain and unmistakable words, the probate court "had no jurisdiction over the person or property of appellee" (a non-resident incompetent who owned land in Benton County) and "could acquire none by the appointment of a local guardian," what the court ordered done by its appointee the "guardian," or "curator," *i. e.,* whether it ordered the non-resident incompetent's lands sold, rented or whatnot, does not alter the determinative fact on which the Court's decision in *Patton* v. *Taylor* is based: *The probate court lacked jurisdiction of the subject matter and, consequently, the proceeding was void.*

Respondents next attempted to squeeze a grant of jurisdiction from the fact that some of the statutes dealing with applications by domiciliary guardians of non-resident incompetents for leave to sell or lease lands in Arkansas or for funds in the probate courts contain references to resident "executors, administrators, guardians," *et cetera,* and say that, therefore, the Legislature must have intended that the probate court have jurisdiction to appoint guardians or "curators" for non-resident incompetents.

If such as that will substitute for a constitutional provision or statute conferring such jurisdiction, in the face of all these cases saying that in the absence of such a grant, the probate courts had no such jurisdiction and overcome the case of *Patton* v. *Taylor,* specifically saying that the probate courts did not have jurisdiction, petitioners can only say "so be it."

Lastly, respondents sought below to derive some consolation from a statement in the opinion denying petition to rehear in *Texas Company* v. *Sewell* (202 Ark. 34, 149 S. W. 2d 925), which was the second appeal in *Sewell* v. *Benson* (198 Ark. 339, 128 S. W. 2d 683), to the effect that it was not the court's intention to hold that under no circumstances could a probate court appoint a resident guardian for a non-resident *minor*. The court needs but to casually read those two cases to see that the Supreme Court of Arkansas held in no uncertain terms in those cases that the appointment by a probate court of a resident guardian of the estate of a non-resident minor *under guardianship in another state* was VOID.

In the face of these authorities, will this Court sit idly by and not only see these respondents profit by the exercise of that usurped jurisdiction and at the same time place the stamp of its approval on a decision which amounts to saying that though the Constitution or statutes of Arkansas never conferred such jurisdiction upon the Probate Court of Crittenden County as it undertook to exercise in this instance, these incompetent, non-resident petitioners have conferred such jurisdiction upon that court by their domiciliary guardian's begging and receiving from the "curator" an average of $1,400.00 per year for a plantation having a fair rental value of $9,000.00 per year, rather than see his penniless wards cut off without a cent—as this record shows they have been now for the past three years (Third and Fourth Appeals, R. 18-19 and 29)—while the trespassers continue to profit by that usurpation and the guardian of petitioners conducts an expensive, protracted and sanguinary litigation in the only courts in which he could hope to redress the wrongs done his wards?

NOTE: Lest it be again suggested that if the proceeding in which the bond is given is void the surety on the

bond is not liable, and hence that the complaint states no cause of action as to the two surety company respondents, petitioners would invite attention to what the Supreme Court of Arkansas said on that subject in

Hastings v. *United States Fidelity & Guaranty Co.*, 116 Ark. 118, 259 S. W. 735.

Also see:

Hyde v. *McNeely*, (1937) 193 Ark. 1139, 104 S. W. 2d 1068.

Point Two: Moreover, and aside from that, and aside from the alleged fraud and lack of process or notice of any kind to these non-resident owners or their guardian, this record conclusively shows that the probate court never even attempted in that "curatorship" proceeding to exercise whatever jurisdiction it may have had as to the rights of petitioner Mildred Ion Redditt, who was then a one-fourth and is now a one-third, co-tenant in that plantation, and leaves considerable doubt as to whether the court exercised effectively whatever jurisdiction it had as to plaintiff James Williford Redditt, who also owned a one-fourth, and now owns a one-third, undivided interest in that plantation:

The record shows (First Appeal, R. 22 and 23) **that the petition and order under which Curlin was appointed "curator" show on their face that he sought to be, and was appointed only for the lands of "Aquilla, J. W., Jr., Mary Lou and Ernest Redditt." (Mary Lou Redditt had been dead 9 years when that petition and order were filed and entered** (First Appeal, R. 4). **So far as this record shows, there never was a "J. W., Jr.," among the children of Greenberry Redditt who are the owners of this property.) How an adjudication as to them could affect the rights of petitioners Mildred Ion Redditt and James Williford Red-**

ditt, who are the owners in co-tenancy of two-thirds of this plantation, is left unexplained.

See: Authorities cited under "Point One" hereof.

And: "Complaint," First Appeal, R. 2-13.

Petition of Howard Curlin for appointment of himself as "curator," First Appeal, R. 22.

Order appointing Howard Curlin as "curator," First Appeal, R. 23.

Point Three: The petition of November 2, 1949 (First Appeal, R. 26), **was filed pursuant to an Arkansas statute authorizing a foreign guardian to petition in the probate court for leave to rent his ward's lands in Arkansas, et cetera. Whatever may rightly be said of petitioners' taking "contradictory positions" in commencing this federal court action "without dismissing" that petition, there is no basis in law or reason for saying that the filing of that petition conferred upon the Probate Court of Crittenden County, Arkansas, jurisdiction which the constitution or statutes had not conferred upon that court.**

The dismissal of that petition—before the proof in chief in support thereof had even been heard—was pursuant to the Arkansas statutes and cases permitting voluntary dismissals at any time before "final submission" upon payment of costs.

No accounting could have been had under that petition unless the probate court, in its discretion, saw fit to grant the petition, and certain it is that the petition was not granted and no accounting was had.

Therefore, whether the dismissal of that petition was voluntary or involuntary does not alter the soundness of the assertion that its dismissal was not res judicata of petitioners' rights either as to the only two respondents

who were parties to that petition (Hale and surety) or as to the other respondents here—who were not parties to that petition and as to whom the Eighth Circuit held (on the First Appeal) that the pendency of that petition did not even afford grounds for partially and temporarily abating this action.

The petition of November 2, 1949 (First Appeal, R. 26), was filed pursuant to the provisions of the Acts of 1949, No. 140, Chapter 234, page 304 (Title 57, Sec. 647, "Arkansas Statutes, 1947 Annotated"), which provides, *inter alia,* that the domiciliary guardian of a non-resident incompetent owning land in Arkansas may petition the Probate Court of the county wherein the land is situated for authority:

> "To sell, mortgage, lease or exchange the property of his ward or to take any other action with reference thereto which a locally appointed guardian would be authorized to take and to remove the proceeds to the domicile of the guardian and his wards."

That statute further provides:

> "Upon being satisfied that the foreign guardian is duly appointed, qualified and acting, that his bond is sufficient under the laws of the jurisdiction of his appointment to protect the property of the ward within that jurisdiction and the property within this state, or its proceeds, or that no bond is required in the jurisdiction of his appointment, and that the action ordered to be taken is for the best interest of the ward and his estate, the court may, if there be no locally appointed guardian, grant the petition in whole or in part and direct the foreign guardian to proceed with the directed action in the same manner as is provided for similar action by a resident guardian of the estate of a resident ward.
>
> "If there be a locally appointed guardian, and upon the same findings as to qualifications of the foreign

guardian and the sufficiency of his bond, if any, the court, in the exercise of its discretion, may:

1. Order the termination of the local guardianship and the payment, transfer or delivery of the property of the ward to the foreign guardian and grant the petition of the foreign guardian, in whole or in part; or

2. Order the local guardian to take the action, in whole or in part, for which the foreign guardian asked authority; or

3. Deny the petition.

"*If the Court shall order the termination* of the local guardianship, the local guardian shall file his account forthwith" (Emphasis supplied).

It scarcely seems necessary, in the light of the admission of their attorney (Second Appeal, R. 7), that the proof had not been closed, to cite authority for the elementary proposition that there had been no "final submission" of the petition of November 2, 1949, but because the statutes and practice vary somewhat in the different states, the following Arkansas statutes and decisions are offered on that point:

"Arkansas Statutes, 1947, Annotated."

TITLE 27.

"Sec. 1405. Dismissal of Actions.

"An action may be dismissed without prejudice to a future action:

First: By the plaintiff before the *final submission* of the case to the jury, or to the court, where the trial is by the court.

Second: By the court where the plaintiff fails to appear on the trial.

Third: By the court for the want of necessary parties.

Fourth: By the court on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

Fifth: By the court, for disobedience by the plaintiff of an order concerning the proceedings in the action.

In all other cases, upon the trial of the action, the decision must be upon the merits (Civil Code, Sec. 402; C. & M. Dig., Sec. 1261; Pope's Dig., Sec. 1485)" (Italics supplied).

Obviously a cause is not "finally submitted" until the evidence is in, all the evidence.

17 Am. Jur., p. 72, "Dismissal and Discontinuance." "Sec. 24. Meaning of 'Final Submission.' "

The plaintiff has an absolute right to dismiss his case at any time before submission to the court or jury.

St. Louis, I. M. & S. R. Co. v. *Ingram,* 118 Ark. 377, 176 S. W. 692.

The same rule applies in equity causes in Arkansas.

Fox v. *Pinson,* 182 Ark. 936, 34 S. W. 2d 459, 74 A. L. R. 583.

Mutual Benefit Health & Accd. Assn. v. *Filley,* 174 Ark. 932, 298 S. W. 215.

"Arkansas Statutes, 1947, Annotated."

TITLE 27.

"Sec. 1406. Dismissal in Vacation.

"The plaintiff or his attorney may dismiss *any suit* pending in *any of the courts* of this State, except actions in replevin, in vacation, in the office of the clerk, on payment of all costs that may have accrued

therein. Civ. Stat., Ch. 116, Sec. 134; C. & M. Dig., Sec. 1262; Pope's Dig., Sec. 1486)" (Italics supplied).

A nonsuit taken before a clerk *in vacation*, on payment of costs, is authorized by the statute.

Lyons v. *Green*, 68 Ark. 205, 56 S. W. 1075.

"*Vacation*" as used in this section, is not, a technical term but means "*any time when the court is not in session.*"

St. Louis, I. M. & S. Ry. Co. v. *Ingram*, 118 Ark. 377, 176 S. W. 692.

Plaintiff has a right to dismiss any suit he has brought by application either to the court or to the clerk in vacation.

Norton v. *Hutchins*, 196 Ark. 856, 120 S. W. 2d 358.

SUBSTANTIAL COMPLIANCE.

Action of plaintiffs' counsel in writing the clerk of the circuit court to dismiss pending action and payment of all costs were held to amount to a dismissal of the action as authorized by this section.

Missouri Pac. R. Co. v. *Haigler*, 203 Ark. 804, 158 S. W. 2d 703.

Point Four: There is an Arkansas statute which expressly eliminates the running of any period of limitations against insane persons. The Eighth Circuit cites no reason nor authority for holding that statutory exception inapplicable to incompetents resident and under guardianship in another state, and this record suggests none.

"If any person entitled to bring any action, under any law of this State, be, at the time of the accrual of the cause of action, under twenty-one (21) years of age, or INSANE, or imprisoned beyond the limits of the State, such person shall be at liberty to bring

such action within three (3) years after full age, or such disability may be removed" (Capitals supplied).

"Arkansas Statutes, 1947 Annotated," Title 37, Section 226.

Point Five: A complaint should not be dismissed for insufficiency under the "Rules of Civil Procedure" unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts which could be proven in support of his claim. And by the express words of Rule 56, a motion for summary judgment should be granted only when it clearly appears that

> **"..... there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."**

How, on this record, the "complaint" in this cause (First Appeal, R. 2-13) **can be dismissed on motion under either Rule 12 or Rule 56 without doing violence to the principles controlling the practice under those rules, as announced by this court in an unbroken line of decisions, is a mystery. To permit those salutary principles to be prostituted by the dubious expedient of hypothesizing that**

> **"The facts are not in dispute."**

is to disavow those principles and to make of those rules a treacherous means for giving an aura of legitimacy to an unjustifiable conclusion.

Kennedy v. *Silas Mason Co.*, (1948) 334 U. S. 249, 68 S. Ct. 1021, 92 L. Ed. 1347.

Lillie v. *Thompson*, (1947) 332 U. S. 459, 68 S. Ct. 140, 92 L. Ed. 73.

Sartor v. *Arkansas Natural Gas Corp.*, (1944) 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967.

CONCLUSION.

The constitutional right of citizens of different states to the independent opinion and judgment of the judges of the national courts is not a matter of grace, deniable by any means whatsoever upon considerations of convenience, expediency, personalities or otherwise, or because to effectuate that right requires decision of questions of law, difficult or easy, state or federal. Indeed, it is a right the denial of which often leaves litigants remediless, as this case illustrates and as our history has proven, time and time again, since the days when Chief Justice Marshall brandished the mace of federal authority in the faces of the despoilers of the Cherokees.

But fortunately the "basic question" of state law posed by this case is neither obscure nor difficult: The "curatorship" proceeding, under the egis of which these defendants have for so long been protected in their machinations, is obviously void on the face of the record for want of jurisdiction of either subject matter or necessary parties under the plain words of the Constitution and statutes of the State of Arkansas and of the decisions of the Supreme Court of that State. It follows, therefore, that the respondents are at best trespassers or trustees *ex maleficio* and at worst co-conspirators and liable as such, and there is no reason for not frankly and fully so declaring in unmistakable terms. That is unless reason is to be found in the iniquitous principle that "Justice is a matter to be discussed only between equals."

Once it is understood that the so-called "curatorship" proceeding is void under the law of Arkansas for want of jurisdiction of either subject matter of necessary parties, it becomes apparent that the other questions of state law

with which the issues in this litigation have become enshrouded are of no consequence: (1) Obviously, the necessitious supplications of the guardians of these non-resident, incompetent petitioners did not confer upon the Probate Court of Crittenden County, Arkansas, jurisdiction denied that court by the Constitution and statutes of Arkansas, nor did their petition of November 2, 1949; (2) No accounting could have been had under the petition of November 2, 1949, even as to the two respondents who were parties thereto, unless the Probate Judge, in his discretion, had seen fit to grant that petition (and certain it is that the petition was not granted and no accounting was had), and to say now that the dismissal of that petition (whether voluntary or involuntary) is *res judicata* of the issues presented here is absurd; (3) No statute of limitations bars the assertion of the claims stated by this complaint, especially when the Arkansas statute cited above expressly tolls the running of any period of limitation against insane persons, an exception especially applicable to incompetents resident and under guardianship in another state; and (4) The settlements on Curlin's estate did not validate his void appointment as "curator" or in any way bind these petitioners.

And the answer to the only federal question requiring decision in the circumstances is equally simple and apparent: The "complaint" in this cause cannot rightly be dismissed on this record on motion either under Rule 12 or Rule 56.

Therefore, this Court should declare the "curatorship" proceeding to be as the Constitution, statutes and decisions of Arkansas say that it is—void on the face of the record and direct this case to be tried on its merits, in accordance with the "Rules of Civil Procedure" and with

this Court's previous decisions construing and applying these rules.

Respectfully submitted,

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Of Counsel for Petitioners.

CERTIFICATE OF SERVICE.

Notice of the filing of this petition, together with a copy of the printed record, was heretofore served on counsel for respondents, and six printed copies of the foregoing petition and brief are today being sent them by registered mail as follows:

Two copies to:

Barrett Wheatley Smith and Deacon,
Attorneys at Law,
McAdam Building,
Jonesboro, Arkansas,

and

Two copies to:

Frierson Walker and Snellgrove,
Attorneys at Law,
Frierson Building,
Jonesboro, Arkansas,

This January 8, 1953.

THOMAS F. TURLEY, JR.,
Attorney for Petitioners.

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FILED
FEB 11 1953
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 547

AQUILLA REDDITT, JAMES WILLIFORD REDDITT and MILDRED ION REDDITT, Non Compos Mentis, by BENNETT H. HURT, Their Domiciliary Guardian and Next Friend, and BENNETT H. HURT, Domiciliary Administrator of the ESTATE OF ERNEST REDDITT, Deceased, Petitioners,

v.

JAMES C. HALE, Individually and as Curator by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATES OF AQUILLA REDDITT, JAMES WILLIFORD REDDITT, MARY LOU REDDITT and ERNEST REDDITT and/or MILDRED ION REDDITT, JOHN FOGLEMAN, KATHLEEN KIRK WILLIFORD, Individually and as Executrix by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATE OF J. E. WILLIFORD, Deceased, NATIONAL SURETY CORPORATION, a New York Corporation Domesticated and Doing Business in Arkansas, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New York Corporation Domesticated and Doing Business in Arkansas, Respondents.

Certiorari to Eighth Circuit.

BRIEF

Opposing Grant of Writ of Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. .....

AQUILLA REDDITT, JAMES WILLIFORD REDDITT and MILDRED ION REDDITT, Non Compos Mentis, by BENNETT H. HURT, Their Domiciliary Guardian and Next Friend, and BENNETT H. HURT, Domiciliary Administrator of the ESTATE OF ERNEST REDDITT, Deceased, Petitioners,

v.

JAMES C. HALE, Individually and as Curator by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATES OF AQUILLA REDDITT, JAMES WILLIFORD REDDITT, MARY LOU REDDITT and ERNEST REDDITT and/or MILDRED ION REDDITT, JOHN FOGLEMAN, KATHLEEN KIRK WILLIFORD, Individually and as Executrix by Appointment of the Probate Court of Crittenden County, Arkansas, of the ESTATE OF J. E. WILLIFORD, Deceased, NATIONAL SURETY CORPORATION, a New York Corporation Domesticated and Doing Business in Arkansas, and FIDELITY AND CASUALTY COMPANY OF NEW YORK, a New York Corporation Domesticated and Doing Business in Arkansas, Respondents.

Certiorari to Eighth Circuit.

BRIEF

Opposing Grant of Writ of Certiorari.

OPINIONS BELOW.

Opinion of United States Court of Appeals for the Eighth Circuit rendered October 29, 1952, in two cases styled **Redditt et al. v. Hale et al.**, No. 14,559, and **Redditt**

et al. v. Fogleman et al., No. 14,560, appears in advance sheets 199 Fed. 2d 386. There are two appeals to the Court of Appeals and two judgments there, affirming two separate Orders of Dismissal entered in the District Court, one affecting one group of the respondents and another the remainder (R. No. 14,559, pp. 5 and 30). A single petition for certiorari has been filed and it does not appear which of the cases is to be reviewed. Memorandum opinions of the United States District Court for the Eastern District of Arkansas from which these two appeals were taken, are unpublished but appear in the record (R. No. 14,559, pp. 5 and 31). Earlier appeals to the Court of Appeals for the Eighth Circuit are reported **Redditt v. Hale**, 184 Fed. 2d 443, **Redditt v. Trimble**, 186 Fed. 2d 716, and **Redditt v. Hale**, 188 Fed. 2d 832.

STATEMENT OF CASE.

The record presented to this Court consists of records of three successive appeals to the Court of Appeals of the Eighth Circuit, with proceedings in that court added. To minimize confusion in page references, we shall refer to them thus: R. No. 14,159 for the record on the first appeal; R. No. 14,295 for the record on the second appeal; R. No. 14559 for the record on the third appeal (which also includes Cause No. 14,560); Supp. R. for the supplemental record filed on the third appeal; and R. for proceedings in the Court of Appeals appearing only in the record in the Supreme Court.

The petitioner Hurt is guardian of three children of Sudie Agnes Williford Redditt and administrator of the estate of a fourth, all of whom, like their mother, were insane. The four children inherited from their mother, who died many years ago, a farm in Crittenden County, Arkansas. In 1924 on the petition of their father the four Redditt children were adjudged by the Probate Court of

Shelby County, Tennessee, where they were domiciled, to be insane, and a guardian was appointed for them. The guardianship has been continued to date with various changes in guardians due to resignation and death, and the petitioner Hurt is the present guardian in succession.

The domiciliary guardian rented the Crittenden County lands to James E. Williford, uncle of the Redditts, until 1933. On January 9, 1933, the Probate Court of Crittenden County, Arkansas, appointed Howard Curlin curator of the estate of these wards in that county. According to the statements of J. B. Bicknell, who was then the domiciliary guardian appointed in Shelby County, Tennessee, the arrangements for this appointment of Curlin as curator were made by him and his counsel and that guardian stated in a report filed in the Shelby County Chancery Court in 1935: "The main corpus of their estate is a plantation in Crittenden County, Arkansas, which I keep rented through a curator in that county, who accounts to me each year for the rents received" (Supp. R. 21, 24). After having been appointed curator, Howard Curlin gave bond with the respondent Fidelity and Casualty Company of New York as surety, and again rented the property to James E. Williford. This arrangement continued until the death of Curlin some time in 1941.

On December 20, 1941, the Probate Court of Crittenden County appointed the respondent James C. Hale as curator in succession, and he qualified by giving bond with respondent National Surety Corporation as his surety. The administrator of the estate of Howard Curlin filed final settlement for Curlin as curator, and by order of the Probate Court of Crittenden County entered October 19, 1942, the final settlement of Howard Curlin as curator of the estate of the four Redditts was approved and confirmed (R. No. 14,559, p. 13, Supp. R. 54).

No appeal was taken from this order of confirmation, and it appears that the guardian in Tennessee duly obtained the funds (Supp. R. 56).

Respondent Hale, as curator in succession, continued to rent the lands to James E. Williford until his death July 13, 1949, and since that date has rented them to respondent Kathleen Kirk Williford, widow of James E. Williford, who is also executrix of his estate. During all these years up until November, 1949, the Tennessee guardian legally withdrew funds from the Crittenden County curator, as the complaint in this case admits (R. No. 14,159, p. 11). The complaint states that the petitioner Hurt was appointed guardian in succession in 1947 and like his predecessor continued to withdraw these funds and in his settlement in the Shelby County Court in April, 1949, stated to the court that the curator's settlements in Crittenden County appeared regular on their face and had been approved by the Crittenden County Probate Court (Supp. R. 35).

On November 2, 1949, petitioner Hurt, as guardian in succession, filed his petition in the Crittenden County Probate Court against the respondent Hale, as curator of the Redditt estates, demanding an accounting and that the funds in his hands be delivered to the domiciliary guardian and that the domiciliary guardian take charge of and rent the Crittenden County lands (R. No. 14,159, pp. 26-28). Hale filed a response setting out the beneficial results to the estate under the administration and praying directions of the Probate Court of Crittenden County in the premises (R. No. 14,159, pp. 29-31).

While this cause was pending in the Probate Court of Crittenden County petitioner Hurt on behalf of the three living wards, and as administrator of the estate of the de-

ceased ward, filed the instant suit in the United States District Court for the Eastern District of Arkansas at Jonesboro against Hale individually and as curator of the estates of the Redditts, John Fogleman, his attorney, Kathleen Kirk Williford, individually and as executrix of the estate of James E. Williford, deceased, National Surety Corporation, Hale's bondsman, and Fidelity and Casualty Company which was bondsman of both Howard Curlin as curator and Kathleen Kirk Williford as executrix. The complaint does not make it clear in which capacity Fidelity and Casualty Company is sued (R. No. 14,159, pp. 1-14). The basic allegations of the complaint are that all of the proceedings in the Probate Court of Crittenden County were void for want of jurisdiction, that over the entire period of the curatorship the lands were rented for inadequate price, and that the petitioners are entitled to the difference between reasonable rental and the amount paid, amounting to an alleged sum of $142,200.00, for which judgment is prayed.

This case in various aspects has already been before the Court of Appeals four times; see **Redditt v. Hale**, 184 F. 2d 443; **Redditt v. Trimble**, 186 F. 2d 716; **Redditt v. Hale**, 188 F. 2d 832, and **Redditt v. Hale**, 199 F. 2d 386. Following the first appeal the defendants John Fogleman and Fidelity and Casualty Company of New York filed their separate answer (Supp. R. 1-8) and Kathleen Kirk Williford individually and as executrix of the estate of James E. Williford, filed her separate answer (Supp. R. 8-14). Each of these answers admits those facts which are matters of record but denies all of the allegations of wrong doing, and pleads the statute of limitations, laches, estoppel, and res adjudicata, by reason of the long series of dealings between Hurt and his predecessors with the curator in Crittenden County and the various orders of that court confirming settlements of the curators (Supp. R. 35, 42, 54).

On December 15, 1950, the Probate Court of Crittenden County dismissed on the merits after submission the petition of petitioner Hurt for accounting and removal of the funds which had theretofore been filed in that court (R. No. 14,559, pp. 2-3, 14-15). No appeal was taken from this order.

Thereafter petitioner Hurt filed in the United States District Court motion to require the respondent Hale and the National Surety Corporation to answer, and these respondents countered with a motion to dismiss (R. No. 14,559, pp. 3-4) on the ground that the order of the Probate Court of Crittenden County, entered December 15, 1950, was res adjudicata. This motion was granted (R. No. 14,559, p. 5) for reasons set out in memorandum opinion (R. No. 14,559, pp. 5-12).

The defendants Fogleman, Kathleen Kirk Williford, individually and as executrix, and Fidelity Casualty Company thereupon filed a motion for summary judgment (R. No. 14,559, pp. 13-14), which was also granted (R. No. 14,559, pp. 30-31). This court filed a memorandum opinion setting forth reasons for this action (R. No. 14,559, pp. 31-35). Appeals followed to the Court of Appeals for the Eighth Circuit, where the judgments were affirmed. This petition for certiorari is the latest step.

ARGUMENT.

Summary.

A. This Is Not a Matter of Sufficient Gravity and Importance to Justify Review by this Court.

Neither the record nor the petition for certiorari shows special and important reasons for granting the writ. Questions decided are of local law and of no general importance. Rules of the Supreme Court of the United States, Rule 38, paragraph 5, Subparagraph 5 (b).

The question of jurisdiction of the Probate Court here raised has never been presented to the Supreme Court of Arkansas since Statehood. It is unlikely to recur because the General Assembly of Arkansas, in 1949, adopted a new Probate code which specifically provides for the jurisdiction here questioned.

Act 140 of the General Assembly of Arkansas for 1949, page 304, Sections 179 and 187;

Arkansas Statutes Annotated, 1947, Sections 62-3101 to 62-3109, inclusive;

Separate opinion of Mr. Justice Frankfurter in **United States v. Shannon**, decided January 14, 1952, 342 U. S. 288, 96 L. Ed. 321, 72 S. Ct. 281;

Ex Parte Woods, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417.

On matters of local law this Court will not re-examine decisions concurred in by federal trial judges and circuit judges of long experience in the law of the state involved.

Skelly Oil Company v. Phillips Petroleum Company, 339 U. S. 667, 94 L. Ed. 1194, 70 S. Ct. 876;

McGregor v. State Mutual Life Assurance Company, 315 U. S. 280, 86 L. Ed. 846, 62 S. Ct. 607;

Helvering v. Stuart, 317 U. S. 154, 87 L. Ed. 154, 63 S. Ct. 140;

Spiegel v. Commissioner, 335 U. S. 701, 93 L. Ed. 330, 69 S. Ct. 301;

Proper v. Clark, 337 U. S. 472, 93 L. Ed. 1480, 69 S. Ct. 1333;

Redditt v. Hale, 199 Fed. 2d 386, at 388-389.

The decision of the Arkansas trial court upholding its own jurisdiction is entitled to great weight in the absence of a decision of the Supreme Court of Arkansas on the point.

West v. American Telephone and Telegraph Company, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A. L. R. 956; **Annotation**, 132 A. L. R. 964;

Fidelity Union Trust Company v. Field, 311 U. S. 169, 85 L. Ed. 109, 61 S. Ct. 176;

King v. United Commercial Travelers, 333 U. S. 153, 92 L. Ed. 608, 68 S. Ct. 488;

Redditt v. Hale, 199 Fed. 2d 386, at 389.

B. **The Decision of the Court of Appeals Was Correct.**

POINT I.

Probate Court of Crittenden County, Arkansas, had jurisdiction to appoint a curator for lands of non-resident insane persons.

Branch v. Veterans Administration, 189 Ark. 662, 74 S. W. 2d 800;

Day v. Johnston, 158 Ark. 478, 250 S. W. 532;

Hare v. Shaw, 84 Ark. 32, at 35, 104 S. W. 931, at 932;

Hooper v. Wist, 138 Ark. 289, 211 S. W. 143;

Hyde v. McNeely, 193 Ark. 1139, 104 S. W. 2d 1068;

Monks v. Duffle, 163 Ark. 118, 259 S. W. 735;

Payne v. Arkebauer, 190 Ark. 614, 80 S. W. 2d 76;

Patton v. Taylor, 144 Ark. 254, 222 S. W. 49;

Redditt v. Hale, 184 F. 2d 443;

Redditt v. Trimble, Judge, 186 F. 2d 716;

Sanders v. Omohundro, 204 Ark. 1040, 166 S. W. 2d 657;
Sewell v. Benson, 198 Ark. 339, 128 S. W. 2d 683;
Sewell v. Reed, 189 Ark. 50, 71 S. W. 2d 191;
The Texas Company v. Sewell, 202 Ark. 34, 149 S. W. 2d 925;
Arkansas Constitution of 1874, Article VII, Sec. 34;
Probate Code of 1949, Act 140 of General Assembly of Ark. for 1949, page 304;
Crawford and Moses Digest of Statutes of Ark., Sec. 5829;
Ark. Stats., Sec. 57-301;
Ark. Stats., Sec. 57-329;
Ark. Stats., Sec. 57-330;
Ark. Stats., Sec. 57-401;
Ark. Stats., Sec. 57-449;
Ark. Stats., Sec. 57-547;
Ark. Stats., Sec. 57-603;
Ark. Stats., Secs. 62-3101 to 62-3109;
3 Arkansas Law Review, No. 4, p. 375;
Annotation, 102 A. L. R. 445 and 447.

POINT II.

The judgment of the Crittenden County Probate Court of December 15, 1950, is res adjudicata of all issues between petitioners and respondent James C. Hale and those in privity with Hale.

Missouri Pacific Railroad Company v. McGuire, 205 Ark. 658, at 661, 169 S. W. 2d 872;
Moore v. Allen, 121 Ark. 335, at 341, 181 S. W. 908;
Moore v. Sloan, 71 Ark. 599, 76 S. W. 1058;
Myers v. Wheatley, 144 Ark. 29, at 32, 222 S. W. 357;
Payne v. Arkebauer, 190 Ark. 614, 80 S. W. 2d 76;
Parker v. Williams, 172 Ark. 699, 290 S. W. 67;
Raymond v. Young, 211 Ark. 577, 201 S. W. 2d 583;

Woodall v. Moore, 55 Ark. 22, 17 S. W. 268;
Ark. Stats., Sec. 27-1405;
Ark. Stats., Sec. 27-2106.

POINT III.

As to transactions between Howard Curlin, the previous curator, and J. E. Williford, plaintiffs are barred by the Final Settlement filed by Curlin's Administrator and approved by the Crittenden Probate Court, October 19, 1942.

Moore v. Allen, 121 Ark. 335, at 341, 181 S. W. 908;
Myers v. Wheatley, 144 Ark. 29, at 32, 222 S. W. 357.

POINT IV.

Respondents are barred by the statute of limitations, laches and estoppel.

Chase v. Cartwright, 53 Ark. 358, 14 S. W. 90;
Fidelity and Deposit Company v. Myer, Guardian, 197 Ark. 42, 121 S. W. 2d 873;
George v. Serrett, Administrator, 207 Ark. 568, 182 S. W. 2d 198;
Moore v. Allen, 121 Ark. 335, 181 S. W. 908;
Hart v. Citizens National Bank (Kan.), 185 Pac. 1, 7 A. L. R. 933;
Little v. McGuire, 113 Ark. 497, at 501, 168 S. W. 1084;
Smith v. Smithson, 48 Ark. 261, 3 S. W. 49;
Wallace v. Sweptston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94;
34 **Am. Jur., Limitation of Actions**, Secs. 374, 375.

POINT V.

No cause of action was stated against respondent Fogleman.

DISCUSSION.

We pretermit discussion of the efficacy of a single writ of certiorari to review two decisions of the Court of Appeals in separate appeals taken in the same case. Actually, Hale and his surety, National Surety Corporation, were dismissed by the District Court in one Order of Dismissal which was the subject of one appeal (R. No. 14,559, pp. 5, 12), and the remaining respondents were dismissed in a separate Order of Dismissal based upon a separate motion, which was the subject of another appeal (R. No. 14,559, pp. 30, 36). There was a single record and a single opinion, but the form of record and opinion makes it plain that there were two cases before the Court of Appeals.

A. This Is Not a Matter of Sufficient Gravity and Importance to Justify Review by This Court.

Nothing in the record in this case, or the petition for certiorari, remotely suggests the special and important reasons for granting certiorari required by paragraph 5 of Rule 38 of this Court. Nor is there any showing that the questions decided by the courts below, which are purely matters of local law pertaining to the Arkansas Constitution, Courts and Statutes, are important to the public generally as required by subparagraph 5 (b) of that Rule. Petitioner has thus far failed to impress three courts, presided over by judges learned and experienced in Arkansas law, that the decision below was "probably in conflict with applicable local decisions," as further required by subparagraph 5 (b) of the Rule.

The only question of any consequence raised by the Complaint is the jurisdiction of an Arkansas Probate Court to appoint a curator for the Arkansas estate of the nonresident insane persons. If that Court had jurisdiction, it is elementary that its judgments are res adjudicata and bar

petitioners, who were parties to the proceeding, from questioning them collaterally. As to the importance of the question, it is so remote and obscure that it has never been presented to the Supreme Court of Arkansas for decision in one hundred and seventeen years of Statehood. It can serve no purpose as a precedent for future guidance of the Bar, because the Probate Code adopted by the Arkansas Legislature in 1949 (**Arkansas Statutes Annotated**, 1947, sections 62-3101 to 62-3109; **Act 140 of the General Assembly of Arkansas for 1949**, page 304, sections 179-187) has definitely provided jurisdiction for proceedings in the Probate Court of the type here attacked. The only issue presented is the pretended right of these incompetents to more rent for their lands, a right already denied to exist by one state and two federal courts. This court, with increasing frequency in recent years, has reiterated the statement that in the nature of things it cannot sit in review of every alleged error of every inferior court, nor undertake to answer every complaint of alleged wrong. Its decisions of necessity must be confined to cases where they may be of value as precedents for the guidance of the Bench, Bar and public. A question which has arisen but once in more than one hundred years, and may never arise again, does not need that test (see separate opinion of Mr. Justice Frankfurter in **U. S. v. Shannon**, 342 U. S. 288, 96 L. Ed. 321, 72 S. Ct. 281, decided January 14, 1952). A case bearing some similarity to the one at bar is **Ex Parte Woods**, 143 U. S. 202, 36 L. Ed. 125, 12 S. Ct. 417, where it was held that a decision of the Eighth Circuit Court of Appeals on the questions of whether a judgment of dismissal of a former suit was, under Minnesota law, a bar to a second suit, and whether local law of recovery by servant against master for personal injuries was properly applied, did not present questions of such gravity and importance as to justify review by certiorari. It would appear that the decision in this case by the same Court that, under Arkansas

law, a judgment of dismissal by the Probate Court barred proceedings on the same cause of action in the Federal Court would not be a matter of any greater gravity or importance.

This Court is committed to the rule that on matters of local law it will not re-examine the decisions of the lower courts presided over by judges learned and experienced in local law. "We do not re-examine the local law as applied by the lower courts." **Skelly Oil Company v. Phillips Petroleum Company**, 339 U. S. 667, 94 L. Ed. 1194, 70 S. Ct. 876. This is particularly true where there is lacking a decision on the point by the highest court of the state and a federal judge of long experience and three circuit judges, whose circuit includes the state, have concurred in their interpretation of the local law.

McGregor v. State Mutual Life Assurance Company, 315 U. S. 280, 86 L. Ed. 846, 62 S. Ct. 607;

Helvering v. Stuart, 317 U. S. 154, 87 L. Ed. 154, 63 S. Ct. 140;

Spiegel v. Commissioner, 335 U. S. 701, 93 L. Ed. 330, 69 S. Ct. 301;

Propper v. Clark, 337 U. S. 472, 93 L. Ed. 1480, 69 S. Ct. 1333.

In the case at bar there is admittedly no decision of the Supreme Court of Arkansas directly in point on the jurisdiction of the Probate Court to appoint a curator to rent, manage and preserve property of a non-resident insane person.

Judge Thomas C. Trimble of the U. S. District Court for the Eastern District of Arkansas, with fifteen years of experience on the Federal Bench of that State and (according to Martindale-Hubbell Law Directory) forty-nine years practice in its courts, found that such jurisdiction existed. The Court of Appeals for the Eighth Circuit affirmed in

an opinion by Judge Walter G. Riddick, who was before his elevation to that court, a preeminent member of the Arkansas Bar, and has had forty-five years practice there (according to the same authority). Petitioners' proceeding in the Probate Court in Arkansas was dismissed by Chancellor Francis Cherry, now Governor, who had presided over the Probate Court a number of years, and petitioner did not appeal. Without being able to cite any Arkansas case in point, petitioners' counsel, who are not Arkansas attorneys, ask this Court to overturn the considered judgment of all these judges, learned in Arkansas law and procedure. This request is the more improper because petitioner abandoned the proceeding in the State Court in which he could have obtained a speedy decision on the question from the only court qualified to answer it, the Supreme Court of Arkansas. (See discussion of this point in opinion of the Court of Appeals for the Eighth Circuit; **Redditt v. Hale**, 199 Fed. 2d 386, at 388-389.)

If this Court should accept jurisdiction over this case, it would at the outset be met by the decision of the Probate Court of Crittenden County, Arkansas, that it had jurisdiction to appoint the curator. There being no decision of the Supreme Court of Arkansas on the point, our federal courts will follow the decisions of the lower state courts which are published and followed as a precedent, or at least attribute proper weight to the decisions of such courts.

West v. American Telephone and Telegraph Company, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179, 132 A. L. R. 956;

Fidelity Union Trust Company v. Field, 311 U. S. 169, 85 L. Ed. 109, 61 S. Ct. 176;

Annotation 132 A. L. R. 964.

Although not bound to follow decisions of the trial courts, which are not generally published and followed in the State in which category fall decisions of Arkansas

Chancery Courts, federal courts should attribute some weight to their decisions.

King v. United Commercial Travelers, 333 U. S. 153, 92 L. Ed. 608, 68 S. Ct. 488.

The Court of Appeals in this case considered that the decision of the Probate Court upholding its own jurisdiction was entitled to weight, though not basing its opinion on that point; 199 Fed. 2d 386, at 389.

It follows that even if the Court should find that this litigation was of sufficient importance and general interest to justify review, upon consideration it would inevitably be led to the same conclusion. For this further reason, nothing would be gained by granting the writ of certiorari. The only result would be further useless delay and expenses to all the parties concerned.

B. **The Decision of the Court of Appeals Was Correct.**

Throughout their brief petitioners complain that they have been unable to obtain a hearing of this cause on its merits. This statement indicates a fundamental misconception of the nature of a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. Petitioners do not seem to realize that when the motion for summary judgment was heard the case was heard upon its merits and found not to have any. The issues which were tried on that motion were not mere procedural matters relating to whether petitioners were entitled to a hearing in federal court, but were decisive that they had no cause of action. When the Court of Appeals found that "the facts are not in dispute," it meant that the material facts are matters of record, and conclusively show that there is no cause of action.

POINT I.

Probate Court of Crittenden County, Arkansas, had jurisdiction to appoint a curator for lands of non-resident insane persons.

Jurisdiction of Probate Courts in Arkansas at the time that this curatorship began in 1933 were predicated on **Arkansas Constitution of 1874, Article VII, Section 34,** which read as follows:

> "The judge of the county court shall be the judge of the court of probate, and have such exclusive original jurisdiction in matters relating to the probate of wills, the estates of deceased persons, executors, administrators, guardians and persons of unsound mind and their estates as is now vested in the Circuit Court, or may be hereafter prescribed by law."

By Amendment No. 24, adopted November 8, 1938, this section was amended to provide that the judge of the court having jurisdiction in equity should also be the judge of the Probate Court, but no change was made in provisions as to jurisdiction. Certainly there is nothing in these constitutional provisions which limits the jurisdiction of an Arkansas Probate Court to the estates of resident insane persons or prevents acquisition of jurisdiction of property in the state belonging to non-resident insane persons, and it follows that petitioners' argument that the Crittenden Probate Court was without constitutional jurisdiction has no merit.

Statutory jurisdiction over estates of insane persons is defined in **Ark. Stat.** (1947), Sec. 57-401, which was the statute in force in 1933, in the following language:

> "Jurisdiction of probate courts.—Probate Courts, within their respective counties, shall have power and

jurisdiction to appoint, and possess a superintending control over, guardians to take the care, custody and management of idiots, lunatics, habitual drunkards and persons of unsound mind, who are incapable of conducting their own affairs and their estates, real and personal, and to provide for the safekeeping of such persons, the maintenance of themselves and their families, and the education of their children, if they have any, in the manner hereinafter directed."

It is clear that nothing in the foregoing statutory definition of probate jurisdiction in any way limits the right to administer the estate of a non-resident insane person having property in this state.

The Arkansas statutes recognize and provide for the office of curator and define the difference between a guardian and a curator in **Arkansas Statutes**, Section 57-301, as follows:

"Powers of guardians and curators.—The guardian of the person, whether natural or legal, shall be entitled to the charge, custody and control of the person of his ward, and the care of his education, support and maintenance. The curator shall have the care and management of the estate of the minor, subject to the superintending control of the court; and the guardian of the person and estate of the minor shall have all the powers and perform all the duties both of a guardian of the person and curator."

There was no provision in the Arkansas statutes in effect in 1933 defining **the manner in which a curator is to be appointed** for the property in this state of a non-resident insane person. This is not to say, as petitioners misquote at page 29 of their brief, that we concede that there is no constitutional or statutory provision for such appointment,

and no such concession was ever made. It is quite clear, on the contrary, that the statutes do contemplate that a curator might be appointed for such property, because provision is made for dealing with one and for the removal of property from his custody to that of a foreign domiciliary guardian by **Ark. Stats.**, Sec. 57-449, which was part of Act 200 of the General Assembly of Arkansas for 1929, page 1002. This section reads as follows:

> "Local guardian compelled to deliver property to non-resident guardian—Bond.—Whenever it appears that any such **non-resident insane person has a guardian or curator in this State**, and has also a guardian, curator or conservator in another state or territory, the probate court of the proper county may authorize or compel the resident guardian or curator to deliver over to such foreign guardian all of the property of such insane ward of which he has custody, provided proof shall have been made satisfactory to the probate court by authenticated copies of proceedings in such foreign probate court, showing such foreign guardian, curator (or) conservator has entered into bond in the county and the state of his residence, in double the amount of the value of the property in the hands of such resident guardian, and upon such order being made, the resident guardian shall make a full and complete settlement of his guardianship or curatorship with such foreign guardian. The receipt of such foreign guardian shall fully discharge such resident guardian or curator and his sureties from all liability on account of any of the property so delivered to such foreign guardian." (Emphasis supplied.)

Other earlier statutes making provision for dealings between foreign guardians for non-resident wards are to be found in **Ark. Stats.**, Secs. 57-329, and 57-330, as follows:

57-329:

"Removal of property of nonresident ward.—When any guardian and his ward may both be non-residents of this State, and such ward may be entitled to property of any description in this State, such guardian, on producing satisfactory proof to the court having probate jurisdiction in the proper county, by certificates, according to the act of Congress in such cases, that he has given bond and security in the State in which he and his ward reside, in double the amount of the value of the property, as guardian, then such guardian may demand or sue for and remove any such property to the place of residence of himself and ward."

57-330:

"Discharge of resident guardian upon production of exemplification by non-resident guardian—Notice to resident guardian—Refusal of order of removal.—When such non-resident guardian shall produce an exemplification, under the seal of office (if seal there be) of the proper court in the State of his residence, containing all the interests (entries) or record in relation to his appointment and giving bond, and authenticated as required by act of Congress as aforesaid, the court of the proper county in this State having jurisdiction may cause suitable orders to be made discharging any resident guardian, executor or administrator, and authorizing the delivery and passing over of such property, and, also, requiring receipts to be passed and filed if deemed available (advisable). In all cases a reasonable notice shall be given to the resident guardian, executor or administrator of the intended application for the order of removal; and the court may reject the application and refuse such order whenever it is satisfied it is for the interest of the ward that such removal shall not take place."

Although these statutes apparently cover the situation, the legislature evidently considered more specific authority necessary to make plain that nonresident insane persons might have a curator in this state and to make provision therefor, and as a result the Act of 1929, which is Section 57-449, quoted above, was passed. This section makes it absolutely clear that there is statutory authority for appointment of a curator for the property in Arkansas of a nonresident insane person.

It is to be noted that the present statute, like the preceding one, recognizes that there may be a resident guardian appointed at the place of residence of the incompetent. The Probate Code of 1949, being Act No. 140 of the General Assembly of Arkansas for 1949, page 304, was a revision and recodification of the law of Arkansas relating to probate procedure. Sections 179 to 187 of the Act, now appearing as **Arkansas Statutes**, Sections 62-3101 to 62-3109, are the sections relating to ancillary administration. By Section 190 of the Probate Code, **Arkansas Statutes**, Section 57-603, those apply to guardianships as well as to administration proceedings. Since these sections clearly provide jurisdiction for an ancillary curator such as we have involved in the case at bar, it may be of interest to the court to inquire whether the sections are declaratory of existing law or whether they purport to create new jurisdiction, insofar as they authorize ancillary jurisdiction.

We call attention to an article by E. B. Merriwether, Professor of Law for many years in the University of Arkansas Law School, instructing courses in probate law, who was one of the committee to draft the probate code. This comment appears in an article entitled "**Act 140, The Probate Code,**") **Arkansas Law Review**, No. 4, page 375, and contains the following statement concerning the purpose of the code: "The code only purports to cover

probate procedure and remedial law. It does not change the substantive law of Wills and Administration except incidentally when such changes were deemed necessary in order to make proper remedies or when procedural changes require some incidental changes in the substantive law. The Code does not touch on the statutes relative to descent and distribution, dower, adoption, and the other substantive provisions." From the above it will be seen that the Probate Code did not undertake or purport to enlarge the jurisdiction of the probate court in any respect, and by defining ancillary procedure in guardianship matters it necessarily recognized that ancillary jurisdiction already existed.

It is beyond question that the curatorship in Crittenden County was an ancillary proceeding to the guardianship in Tennessee. In the petition for appointment of a curator the existence of the domiciliary guardianship was recited (R. No. 14,159, p. 23). It has been treated from its inception as an ancillary proceeding by both courts and by the guardian and curator.

Petitioners contended that the probate court did not have jurisdiction to appoint a curator for the property of these nonresidents because their persons were not before the court and they had no notice of the proceeding. There is no evidence in the record of these allegations except the fact that the order of appointment did not recite the presence of the insane persons. In **Payne v. Arkebauer,** 190 Ark. 614, 80 S. W. 2d 76, the Supreme Court of Arkansas held that an order adjudicating a person insane is not void on its face for failure to recite that the person was brought before the court. Additional cases to the same effect are cited in the opinion below, **199 F. 2d 386, at 391.** As to notice, it amply appears that the domiciliary guardian had full knowledge and notice of the proceedings to procure the appointment of the curator in

Arkansas, and according to his own statement caused the action to be taken (R. No. 14,159, pp. 16-21, Supp. R. 24, 21).

The statute which required that the person alleged to be insane must be brought before the court has since been repealed, but was **Section 5829 of Crawford & Moses Digest of the Statutes of Arkansas**, reading as follows:

> "If any person shall give information in writing to such (probate) court that any person in his county is an idiot, lunatic or of unsound mind, and pray that an inquiry thereof be had, the court if satisfied that there is good cause for the exercise of its jurisdiction shall cause the person so charged to be brought before such court and inquiry into the facts by a jury, if the facts be doubtful."

It is apparent that this statute relates only to the original adjudication of insanity of a resident of the county, and has no reference to any proceedings to procure the appointment of a curator for a person of residence elsewhere.

That statute has no application to the instant case because the complaint and the record show that the Redditts had been adjudicated insane in Tennessee, the state of their domicile, long prior to the proceedings in Arkansas, and no complaint is made against the jurisdiction of the Tennessee court (R. No. 14,159, pp. 22-23). The Redditts had been under a Tennessee guardianship for nine years prior to the appointment of the Arkansas curator, and it is not remotely suggested that they are not insane. The Tennessee adjudication was pleaded in the application for the appointment of the Arkansas curator (R. No. 14,159, p. 23). The judgment of the Tennessee court was entitled to full faith and credit in Arkansas; see cases collected on this point in Annotation 102 A. L. R. 445 and 447.

Now, nearly twenty years after the appointment of the Arkansas curator and after every person who was a party to that transaction has died, petitioners raise the question of want of notice. It is not to be overlooked that, although the petitioner Hurt was, according to the allegations of the complaint, appointed in 1947, he carefully delayed more than two years until 1949 to bring this suit after James E. Williford, the last living person having knowledge of the facts, had died (R. No. 14,159, pp. 11-12). Despite that fact he was met by the declarations of predecessor guardian and his attorney that they caused the appointment of the Arkansas curator to be made (Supp. R. 21-24). We can conceive of no better form of notice of these proceedings to the wards than that their guardian should be the moving party in them.

The probate court in Arkansas is a court of superior jurisdiction; as was said in **Branch v. Veterans Administration,** 189 Ark. 662, 74 S. W. 2d 800: "Probate courts are superior courts within the limits of their jurisdiction and where, as in this case, jurisdiction is had of the subject matter, a judgment of such court is impervious to collateral attack. This doctrine is so well settled by numerous decisions of this court that a citation of authority is deemed to be unnecessary."

Hare v. Shaw, 84 Ark. 32, 104 S. W. 931; **Sewell v. Reed,** 189 Ark. 50, 71 S. W. 2d 191; **Day v. Johnston,** 158 Ark. 478, 250 S. W. 532.

It is well settled in this state that, in a collateral attack upon a judgment of a court of general jurisdiction, every presumption will be indulged in favor of the jurisdiction of the court and in favor of the validity of the decree. In view of the presumption in favor of jurisdiction of the court on collateral attack, and the absence of any showing of want of notice, and the positive showing that the guard-

ian acknowledged and participated without objection in the Crittenden probate proceedings over a period of sixteen years, it cannot be said that the district court should have found that there was no notice of the proceedings for appointment of a curator.

Petitioners cite several Arkansas decisions in their argument against the jurisdiction of the probate court, but none of these has any application to the question of jurisdiction to appoint a curator to manage and preserve the property of a nonresident incompetent. In **Patton v. Taylor,** 144 Ark. 254, 222 S. W. 49, the point at issue was whether a curator could be appointed to sell the real estate of a nonresident incompetent having a guardian elsewhere. The only question was the validity of a sale held by the curator. The court held that there was no jurisdiction to appoint a curator **for that purpose** because the statute provided that the domiciliary guardian might make application to the Arkansas court and obtain authority to make such a sale, and that statute is the exclusive manner of holding such a sale. The case does not hold, either directly or by dicta, that the probate court lacks authority to appoint a curator to manage, preserve, and rent the property of a nonresident insane person, and it is significant that the statute giving the foreign guardian authority to sell such property does not give him authority to manage it or rent it. The case has no bearing on the issues here involved. This is the case principally relied upon to show that the Court of Appeals failed to follow Arkansas law, and others cited are even more remote from the facts at bar. This case not being in point, petitioners utterly fail to show that the decision was in conflict with any decision of the state court.

In the **Texas Company v. Sewell,** 202 Ark. 34, 149 S. W. 2d 925, which was a second appeal of **Sewell v. Benton,** 198 Ark. 339, 128 S. W. 2d 683, both of which cases are cited

by the petitioners in their first brief, the court on rehearing pointed out and emphasized that it was not the intention of the court to hold that jurisdiction was lacking in the probate court in a proper case to appoint a curator for the property of a nonresident minor; thus the case, if it is in point at all, is favorable to respondents' position.

Monks v. Duffle, 163 Ark. 118, 259 S. W. 735, involved the original adjudication of insanity of a resident under Crawford & Moses Digest, Section 5289, quoted above, and the appointment of a guardian of the person, and held that the record must show the presence of the person before the court. It may be observed that "record" is not limited to the order of appointment, and petitioner does not pretend to offer the full record of the original appointment of the curator (R. 14,159, pp. 22-23). The **Monks** case did not involve the appointment of a curator for the property of a non-resident who had already been adjudged insane and neither the case nor the statute involved in it has any bearing on the problem at bar. **Hyde v. McNeely**, 193 Ark. 1139, 104 S. W. 2d 1068, involved the same facts and the same statute. The report shows that the case was tried on demurrer, which admitted that the insane person was not before the court and had no notice of the proceeding. Thus it is distinguished from the instant case not only by the fact that it involved a proceeding against a resident rather than a non-resident, and an original adjudication of insanity rather than a case where insanity had already been adjudged, and the appointment of a guardian of the person rather than a curator of property, but also by the fact that the domiciliary guardian in our case had notice and participated in the proceedings of the probate court throughout (Supp. R. 15, 21, 24, 35).

The rule announced in the decisions of **Monks v. Duffle** and **Hyde v. McNeeley**, supra, on which petitioners rely, is strictly limited to proceedings under Crawford & Moses

Digest, Section 5829, and even in the case of residents does not apply to proceedings for the appointment of a guardian under other statutes. This was pointed out in **Sanders v. Omohundro**, 204 Ark. 1040, 166 S. W. 2d 657.

Petitioners have not cited and we have not found any case in which the Supreme Court of Arkansas has decided that the probate court lacks jurisdiction to appoint a curator to manage and preserve the estate of a non-resident incompetent or that the physical presence of the incompetent person is necessary to confer jurisdiction for such an appointment.

We submit that the learned trial judge properly held that the Probate Court of Crittenden County had jurisdiction to appoint the curator, and that there is no basis to overturn his ruling.

POINTS II-V.

We do not burden the Court with discussion of these points. Citations in our summary of argument amply sustain the Court's findings. Obviously this is a matter to be argued if certiorari should be granted and we merely call to the Court's attention that there was ample basis for the Court's decision.

CONCLUSION.

Because of limitations of the record, we have ignored the scurrilous attack made upon the respondents and their predecessors, now dead, in petitioners' brief and have confined ourselves to arguments of law, which we deem to be the appropriate subject for consideration by this Court. This is not to concede that there is any truth in petitioners' insinuations and lurid statements. We submit that petitioners' failure to litigate these issues in the forum and at the time where and when they could be met by

proof of the living witnesses is sufficient answer. Lower courts have painstakingly analyzed the local law and with unanimity have concluded that this litigation should never have been brought. For too long it has wasted these incompetents' assets and inflicted needless expense on respondents. We apologize that it has also wasted this court's valuable time.

Respectfully submitted,

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